MORE MISLEADING CASES IN THE COMMON LAW

REPORTED BY

A. P. HERBERT

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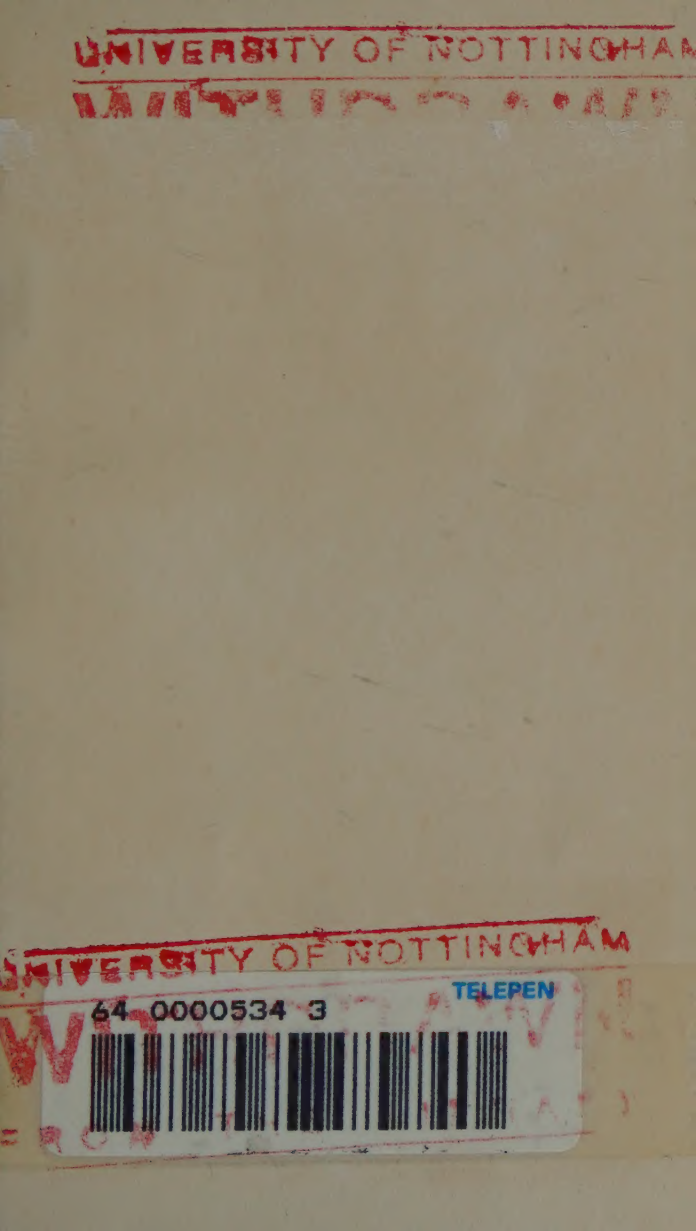

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MORE MISLEADING CASES

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To
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THESE cases, with the exception of I and XII, were first reported in the columns of *Punch*; *Lavender* v. *Ladle* appeared in the *Week-end Review*; my thanks are due to the proprietors of those organs for permission to reprint them.

A. P. H.

MORE MISLEADING CASES

(I) LAVENDER *v.* LADLE

What is an Actress?

(Before Mr. Justice Wool and a Special Jury)

THIS case, which has attracted much public interest, was a libel action arising out of the recent marriage of Miss May Fairy, the well-known musical-comedy star, to Lord Lavender, a subaltern in the Hotwater Guards. It is well known, explained Sir Humphrey Codd, K.C., for the plaintiff, that there exists a tradition in the Brigade of Guards that an officer who marries an actress must resign his commission. Lord Lavender, however, appears to have had the intention of ignoring precedent, for up to the day before his marriage his resignation had not been received. The defendant, Captain Ladle, who is adjutant to the Second Battalion, then wrote to Lord Lavender drawing his attention to the custom and intimating that it was the expectation of his Commanding Officer that Lord Lavender would comply with it.

As a result of that letter Lord Lavender resigned, and Miss Fairy (now Lady Lavender) brought an action for defamation against Captain Ladle, the innuendo complained of being that, as an actress, she was a woman of low moral character and not a fit and proper person to be the wife of an officer in His Majesty's armed forces.

Lady Lavender, in the box, said that she had been first attracted to Lord Lavender by his manly and martial aspect in dress uniform. This uniform included a very high helmet, with chin-strap, which lent an air of dignity and strength to an otherwise weak and undistinguished countenance. Out of uniform he was a different man, and many of her actor friends thought that she had brought discredit on her profession by marrying so insignificant a person.

The Judge: Did any one suggest that you ought to resign from your profession? (*Laughter.*)

Lady Lavender: No, milord. *My* services could not be spared so easily. (*Laughter.*)

Continuing, witness said that it had been her ambition to marry a soldier and be a mother to her husband's troops; she considered she had been cheated. Her character was unimpeccable——

Sir Humphrey Codd: You mean unimpeachable, perhaps?

Witness: I mean what I say. She belonged, she added, to the hardest-working profession in the world. She loved her art. An actress who wished

to be successful had no time to be wicked. What with rehearsing, resting, the care of the skin, and eight performances a week, a musical-comedy star had no time for so much as a naughty thought. Often she worked for fourteen hours in the day; she thought that this was more than they did in the Guards. (*Laughter.*) She had received passionate notes from the stalls, but had never replied to them. She had accepted flowers from strangers, but gifts of jewellery or fruit were politely returned. She had always made it a rule to go straight home from the theatre. She had first met Lord Lavender at a Charity Bazaar. She lived with her mother; very often her mother sat in the wings; her mother was much upset by the insinuations of defendant. (Witness here was overcome.)

The Judge: Let her have a good cry.

A juryman protested against the brutal questioning of Sir Ethelred Rutt, K.C.

Witness, re-examined, said she had announced her intention of giving up the stage. Technically, therefore, at the date of her marriage she was an actress no longer.

Sir Nigel Playfair said that, like other actors, he had been knighted by His Majesty the King.

Sir Humphrey: Does that suggest to you that in the opinion of His Majesty the actor's profession is a not wholly ignoble one?

The Judge: You cannot expect him to tell us what is in the mind of His Majesty.

Sir Ethelred (*cross-examining*) : You are not a musical-comedy actress, Sir Nigel ? (*Laughter.*)

Witness : Alas, no !

Sir Ethelred : Would you admit that there is a distinction between an actor such as yourself and an actress like the plaintiff, who is accustomed to kick her legs in the air ?

Witness : I have often kicked my legs in the air. (*Laughter.*) There is a distinction, certainly. (*Laughter.*) She does it better. (*Loud laughter.*)

Sir Ethelred : Would you say that an actress of those antecedents would be a suitable wife for the Commanding Officer of a battalion of Guards ?

Witness : I should have thought that was a question for the officer concerned.

Re-examined : In his experience the character of the acting profession was almost monastic. He could not name a more virtuous profession. Actresses painted their faces, but so did every other woman. He had seen Miss Fairy in an ' undressing ' scene, but at the end of it she was wearing far more clothes than most of the ladies in the stalls.

Captain Ladle said that the rule in question was not a rule but a tradition. Every officer was aware of it on joining, and no hardship was involved.

Sir Humphrey : Not to the officer perhaps ; but

how about my unhappy client, stigmatized before the world as a person of a lower caste ?

A person in the gallery said "Shame ! " and was removed.

Sir Humphrey : Is there any rule against marrying authoresses, composers, or female painters in water-colours ?

Witness : No.

Sir Humphrey : If an officer had become engaged to Miss Sybil Thorndike or Madame Sarah Bernhardt would he be expected to resign ?

Witness : If they are actresses, certainly.

At this point the jury intimated that they would like to stop the case.

The Judge : You find for the defendant ?

The Foreman : No, milord, for the plaintiff.

The Judge : Ah ! You find that the plaintiff is possessed of such singular beauty and charm that there can be no possible defence for the foul wrong of which she complains ?

The Foreman : Yes, milord.

The Judge : I quite agree.

Sir Ethelred : But, milord, the case for the defence is not completed !

The Judge : The procedure is unusual, I admit, Sir Ethelred, but in this case justified, I think.

Sir Ethelred : Milord, I plead that this was a privileged occasion.

The Judge : Stuff and nonsense, Sir Ethelred !

The radiant plaintiff is not to be deprived of her rights by legal quibbles of that kind. I find, and the jury find, that the defendant has rashly committed to paper the suggestion that the plaintiff is in some way an inferior being to himself, Lord Lavender, and his brother-officers. We have only to look round this Court to appreciate the fantastic nature of such a charge. Physically, plaintiff is without doubt the most nearly perfect specimen of humanity within these walls ; mentally, she has shown herself at least as alert and well-informed as the officers named ; while, morally, the worst that can be said against her is that she has worked her way to a high place in the difficult profession of public entertainment and has given pleasure to many thousands of her fellow-citizens. The Brigade of Guards is an ancient, honourable, and illustrious unit of His Majesty's Army. They retain, as few other units do, the pomp and pageantry, the brightly-coloured uniforms, the resplendent bands, the ceremonial trappings and evolutions of the past. They have, in fact, a closer kinship, in spirit and procedure, with the colour and glitter and music of the theatre than any other unit in His Majesty's forces ; and it is surprising, therefore, to find in this unit alone a superstitious taboo, for matrimonial purposes, of the personnel of the theatre.

I have spoken of the historic attachment of the Guards to music. During his cross-examination of

the witness Playfair, counsel for the defence made the strange suggestion that, while to act in a non-musical drama might, even in the fastidious air of an infantry barracks, be considered respectable, to act in a musical-comedy was not so. It is not clear to me why the addition of music and laughter should make what is otherwise desirable dangerous. And I am the more perplexed when I learn that a female who painted, made jokes, composed music, or wrote verse would not be considered unfit to marry into the Guards, even, it appears, if she practised those arts for the sole purpose of theatrical performances. Nor has any evidence been called to show that the officers of this unit, on their rare evenings of pleasure, are careful to visit only the more serious dramatic pieces and shun those which are embellished with laughter, singing, and dancing ; I am therefore led to the conclusion that we have here a traditional taboo which, whatever its historical origin, cannot be defended in the light of reason and the facts of the present day.

In times past, when the acting profession was less well established and the military more important, some special measures may have been desirable to protect the younger members of His Majesty's bodyguard from entangling alliances with strolling players. But to-day, as Lord Mildew said in *Fox* v. *The Amalgamated Society of Wood-workers*, ' The boot, if I may say so, is on

the other leg.' We live in an age of peace; and, if we have any logic or faith, the arts of peace must now be preferred to the arts of war. His Majesty's Foot Guards are trained to handle explosives and move from place to place with good order and despatch; they are prepared to repel the King's enemies and put down rebellion by means of fire-arms and pointed weapons; and, until such an emergency arises, they are a pleasing ornament to our city, and serve a useful purpose in keeping the streets clear on the occasion of public processions and ceremonies. But it is impossible, in the scale of social values, to weigh their services or gifts against those of the plaintiff, who, although admittedly unable to discharge a fire-arm in a given direction, is accustomed night after night to increase the happiness of thousands by the refining arts of music and dancing, by graceful poses or the recitation of English poetry.

The plaintiff's retirement will cause a loss to her profession and to her countrymen. I do not gather that Lord Lavender's resignation will leave a dangerous gap in the defences of the land. Indeed, the plaintiff has told us that she has lost some credit among her colleagues by allying herself to one who, whatever his knowledge of musketry, is not remarkable for intellectual attainment or the habit of serious study. I find, in general, that the actor's profession is, in law and in fact, as good and worthy as any other. I find, in particular, that

this delicious lady—don't keep bubbling at me, Sir Ethelred—I say, this delicious lady has been defamed by the defendant, and she will have any damages she likes to ask for. Hip, hip, hooray!

(II) HADDOCK *v.* THE KING; HADDOCK *v.* CONSTABLE BOOT; HADDOCK *v.* THE SOUTHERN RAILWAY

Back to the Constitution

A DECISION of the highest constitutional importance was given in this case by the House of Lords to-day.

The Lord Chancellor said: These three appeals have, by leave of your Lordships, been treated as one appeal. The facts are quickly stated. The appellant, Mr. Albert Haddock, presented himself at Victoria Station with a railway and boat ticket for the French port of Calais, issued to him by the Southern Railway. The official at the barrier of the platform inspected the ticket and requested Mr. Haddock to exhibit his passport. Mr. Haddock replied, in direct but courteous terms, that the Southern Railway had contracted to carry him to Calais, that it was not a term of that contract that he should exhibit or even carry a passport, and that he declined to exhibit his passport to a subordinate official of the Southern Railway, who would be better employed in making his journey comfortable than in barring his passage and thus unnecessarily augmenting the nervous strain

incidental to a journey. There was some debate, but at length the official, either impressed by Mr. Haddock's personality and command of language or preferring to leave the responsibility of a decision to his colleagues at Dover, permitted him to pass on to the train.

At Dover, when Mr. Haddock approached the steam-packet, the same request was made and was again refused. But here the official was not to be persuaded, and, although satisfied that Mr. Haddock's ticket was in order, would not allow him to approach the vessel, but even offered him physical resistance, amounting technically to an assault. Mr. Haddock insisted ; the attention of Constable Boot was attracted ; the constable and the official conferred together ; it was decided between them that Mr. Haddock's refusal or inability to exhibit his passport was a suspicious circumstance suggesting that he was a criminal fleeing from justice, and Mr. Haddock was detained—or, to use the proper term, arrested—for inquiries. Mr. Haddock immediately presented his banker's letter of credit and various documents and photographs which established his identity and respectability ; but these were not considered sufficient and the vessel proceeded to France without him.

The Southern Railway have attempted to justify their conduct by pleading that they acted as they did under the orders of His Majesty's Secretary of State for Foreign Affairs ; and Mr. Haddock was

ill-advised enough to bring in the first place an action against the Crown for inducing a breach of his contract with the Southern Railway. Here, as the Courts below have successively decided, and as he himself must be very well aware, he has no tittle of a case. 'The King can do no wrong,'[1] and therefore he cannot induce a breach of contract or be liable for any other tortious act. This may seem strange to those students of history who supposed that the despotic privileges of the Crown were surrendered or destroyed in the seventeenth century, but that is the law. In this case, therefore, Mr. Haddock's appeal must be dismissed.

But the quaint old rule that the King can do no wrong does not mean that he is entitled to command his subjects to do wrong, or to save them harmless if they obey him. It would not, for example, be a good defence to a charge of murder that the King, through the Foreign Secretary, had expressed a dislike for the murdered man; though the King in his clemency might graciously pardon the murderer *after he had been convicted*. This distinction is important—indeed it is fundamental.

The appellant (who cannot, we think, be quite

[1] '*Rex non potest peccare*'; but *vide* Strauss's *Life and Times of King John*. A foreign ruling prince cannot be cited as a co-respondent in a divorce suit in England: *Statham* v. *Statham and the Gaekwar of Baroda* (1912, p. 92). The correct form of the maxim, therefore, would seem to be '*Nullus rex potest peccare*'. But see *Huxley* v. *Phipps, Potts, Slammer & Co.* (later), where the limits of the Pope's authority are discussed.

so guileless as he appears to be) then brought actions against Constable Boot for false imprisonment, and against the Southern Railway for assault (by their servant) and breach of contract. It was urged upon us that the appellant has a bee in his bonnet; but, as Lord Mildew observed in the case of *Merivale* v. *Prout*: 'John Hampden had a bee in his bonnet'; and the presence of a bee in that locality is at any rate a guarantee against cerebral inertia.[1]

It is admitted by the Crown that the Foreign Office did, and does, issue instructions to the Southern Railway that they are to carry no person to France except such as exhibit a passport satisfactory to the Foreign Office. But the Foreign Office is not entitled to issue an instruction to any subject unless that instruction is authorized by an Act of Parliament or by some still surviving, and indubitably surviving, remnant of the prerogative of the Crown.

In this case there is no such Act of Parliament, and the Crown's advisers have not even pretended to discover one. The Foreign Office issues a somewhat peremptory pamphlet entitled, 'Passport Regulations', in which it is stated that every British subject who leaves these shores 'must' do this or that in relation to passports. But it is nowhere stated on what authority that 'must' is

[1] And see Bracton: '*Melior est conditio bombinantis quam moribundi.*'

founded. And unless it can be shown that these commands and regulations are made by virtue of the Royal prerogative they have no better juridical sanction than the rules of grammar or the canons of metrical composition.

Is there any such prerogative? Has the Crown, as such, without the authority of Parliament and in times of peace, a power to forbid the subject to leave the kingdom unless he has the consent of the Foreign Secretary? We find that it has not.

On the contrary, our researches have led us to the singular conclusion that such a power or custom did once exist but has been expressly taken away. In Magna Carta it is clearly provided and promised by the Crown—'for us and for our heirs for ever'—that:

> *'All merchants shall have their safe and sure conduct to depart out of England, to tarry in and go through England, as well by land as by water, to buy and sell, without any manner of evil tolls, by the old and rightful customs, except in time of war.'*

The power which was wrested from King John by the barons (who also suffered, no doubt, from the presence of bees in their bonnets) has not been restored to the Crown by any subsequent enactment or decision; and in this old-fashioned House we hold that Magna Carta, except where it has

been expressly superseded, is still the law.[1] It would be strange if it were otherwise. The King's Dominions and possessions beyond the seas have been conquered, held, and maintained in prosperity through the readiness of his subjects to leave these shores and venture abroad. And that readiness has been in a large measure the fruit of liberty. In times of peace, for many centuries, it has been the unwavering policy of the King and Parliament to extend to the subject who is willing to travel in foreign parts not merely consent but encouragement and even inducements. And one of these inducements has been the personal passport.

What is the passport? It is a document signed by His Majesty's Secretary of State for Foreign Affairs '*requesting and requiring in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him every assistance and protection of which he may stand in need.*'

Evidence has been given in this case which shows that, even where the subject is in possession of what is called a 'valid' passport and obsequiously exhibits it to all who desire to inspect it, the document is in fact productive of more 'lets and hindrances' than any other circumstance of a journey abroad. But in essence the possession of

[1] But see *Rex* v. *Haddock* (*Misleading Cases in the Common Law*, page 74) in which it was *held* (Lugg J.) that Magna Carta was obsolete.

a passport remains a privilege. For the British subject it may even be a right ; but it can never be a duty. The distinction of its origin, the use of His Majesty's name, and the generous enthusiasm of its language, may suggest, and are without doubt intended to suggest, that the bearer is a person especially dear to the Crown and therefore of high moral character. But no man is entitled to argue the converse.

Nevertheless, by the arrogance of the Crown's servants and the weak compliance of the subjects, the character of the passport has been in fact transformed. *What was a privilege has become a duty ; what was a talisman has become an instrument of torture ; what was intended to facilitate free movement has become an engine of obstruction.*[1] In time of war the Crown has an undoubted prerogative to restrict and regulate the movements of the subject. But, my Lords, we are not at war. We are at peace ; and it is desirable that the subject should go about the world as readily and as freely as before. It is said that in recent times the readiness of our citizens to venture abroad has

[1] See *Pétain* v. *Bullock* (1927), 2 A. C. 142, where a Channel swimmer, arriving at Dover, was not permitted to land, having no passport, and was compelled to swim back to France. It was *held* that she could not recover from the landing officer for medical expenses resulting from the fatigues of the return journey. But Monckton points out (*Key Cases in Private International Law*) that plaintiff in that case was an alien and was wearing no clothes. *Quaere*—would this decision cover the case of a British subject, properly dressed ?

diminished, and we are told that the Dominions Office is making special efforts to induce a greater number to leave this country and seek their fortunes over the seas. These efforts are not wholly successful, and, now that we have heard of the obstacles to travel which have been placed by the Foreign Office in Mr. Haddock's path, that does not surprise us. Drake himself, confronted with the same discouragements, might well have degenerated into a stay-at-home.

We were told that these Passport Regulations (so-called) are of assistance in preventing the undesirable alien from entering this country; but this is a somewhat fantastic reason for preventing the respectable Briton from leaving it. We were told that they are of use to the police in the apprehension of escaping criminals. But this has nothing to do with us, with Mr. Haddock, or indeed with the Foreign Office. The police must devise some method of apprehending the guilty traveller without obstructing and persecuting the innocent.

We were told, again, that the regulations are made for the convenience of the traveller. We do not believe it. They were made for the preservation, in peace-time, of an autocratic power justified only by a state of war, and for the benefit of the passport officers in this and other countries. But whether or not these defences have been erected in sincerity they have no foundation in law. If it

is necessary for the good of the realm that such restrictions exist, then Parliament must say so in clear and unmistakable terms. Parliament has not said so, and Mr. Haddock is entitled to proceed to France without exhibiting his passport to any man in these islands. If the French authorities refuse to admit him without a passport that is his own affair. He had in fact a valid passport on his person, which he judged, and rightly judged, was only of interest to the foreign persons to whom it was addressed. Constable Boot and the Southern Railway have injured the appellant; and they may not shelter behind the instructions of the Foreign Office, for those instructions were *ultra vires*, unconstitutional, against public policy, and an 'evil toll' such as is expressly forbidden by Magna Carta. They must pay the consequences. The damages claimed are not extensive, and I recommend that in addition Mr. Haddock receive a grant of five thousand pounds from the Crown in recognition of his public services. There is something to be said for the view that the Passport Office might be indicted as an unlawful conspiracy; but that question we are not called upon to determine.

Lord Lick, *Lord Arrowroot*, *Lord Sweet*, and *Lord Sheep* concurred.

(III) HADDOCK *v.* THWALE

What is a Motor-Car?

THE Court of Appeal to-day gave judgment in this case, which raises an interesting point concerning the rights of the pedestrian and the legal nature of a motor-car.

The Master of the Rolls said: This is an appeal from a judgment of the Lord Chief Justice dismissing an action for damages brought by Mr. Albert Haddock against Mr. Frank Thwale. Mr. Haddock, while crossing a public thoroughfare in London, was knocked down by Mr. Thwale's motor-car and received bodily injury. Such events are now so familiar a part of the life of our streets that few citizens any longer resent or even remark upon them. But Mr. Haddock saw fit to make an accusation of negligence against Mr. Thwale and to demand compensation.

Mr. Thwale replied that Mr. Haddock himself had been guilty of negligence in running across the road in front of his advancing motor-car, which was passing the cross-roads at a reasonable speed of thirty-five miles an hour; that Mr. Haddock was in fact what is contemptuously known as a 'jay-walker', that is to say, a pedestrian who

may in the near future be expected to have wings. (*Laughter.*) Mr. Haddock replied that seven minutes before the accident he had been a prudent and reasonable man, patiently waiting for the motor-cars to go by in order that he might cross the road and keep an appointment, which in his judgment was as important as any of the affairs of the various motorists whose vehicles blocked his passage; that he stood for several minutes under a board marked 'PLEASE CROSS HERE'; that he made five separate attempts to cross at that point, but in each case was driven back in fear to the pavement; that the constable on duty took no steps to arrest the stream of motor-cars; that the said stream continued, and threatened to continue, without interruption; that he was reluctant to spend the remainder of the day on the wrong side of the road; and that at last, growing desperate, he did, in fact, run across the road to a refuge eight yards away in the usual manner of the pedestrian—that is to say, as it were a criminal in flight, a soldier pursued by a sniper, or a common hen; that he under-estimated the speed and ferocity of Mr. Thwale; that Mr. Thwale, though some distance away when the crossing began, was travelling too fast to avoid him, and that, if he is a jay-walker, Mr. Thwale may fairly be described as a jackal-driver.

The Lord Chief Justice directed the jury that it was the duty of both parties to take reasonable

care and to avoid as much as possible the consequences of the negligence of the other, and to recollect that what happened might have been due to the simultaneous negligence of both. The jury found that there had in fact been contributory negligence on the part of Mr. Haddock, and returned a verdict for Mr. Thwale. Mr. Haddock appealed on the ground of misdirection of the jury.

The appellant has conducted his own case with singular ability and charm, and he has advanced a novel proposition. He asks this Court to say that the Lord Chief Justice was wrong in law in placing upon all fours the negligence of a motorist and the negligence of a pedestrian. The appellant's contention is that a far higher standard of care should be demanded of the motorist by reason of his having brought upon the public roads a lethal instrument of great mobility and power. If, says Mr. Haddock, the respondent were to walk on a crowded pavement carrying a loaded gun and with his finger on the trigger, a pedestrian who was wounded by the accidental discharge of that gun would not be held guilty of contributory negligence by reason only that he had failed to keep out of the way or had omitted to proceed upon his hands and knees.

But Mr. Haddock goes further. He has argued that this Court is bound by the celebrated case of *Rylands* v. *Fletcher* (L. R. 3 H. L. 330). In that case the plaintiff's property was damaged by

water which, without any fault of his, escaped from his neighbour's, the defendant's, reservoir. The House of Lords concurred with Mr. Justice Blackburn's memorable pronouncement, which has been set to music : [1]

'We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in *at his peril*; and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape. . . . The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on to his own property (*which was not naturally there*), *harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's*, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. *But for his act in bringing it there no mischief could have accrued*; and it seems but

[1] *Law Students' Glee Book* (Webster and Stow, 2s. 6d.), and see *Middle Temple Madrigals* (Arranged by H. Strauss) 6d.

just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts or water, or filth or stenches.'

'Or motor-cars,' Mr. Haddock adds. And we think he is right. Mr. Thwale's motor-car should in law be regarded as a wild beast; and the boast of its makers that it contains the concentrated power of forty-five horses makes the comparison just. If a man were to bring upon the public street forty-five horses tethered together, and were to gallop them at their full speed past a frequented cross-roads, no lack of agility, judgment, or presence of mind in the pedestrian would be counted such negligence as to excuse his injury. And the fact that the forty-five horses of Mr. Thwale are enclosed in a steel case and can approach without sound or warning does not diminish, but augment, their power to do injury. The ordinary walking citizen cannot be expected to calculate to a nicety the speed, direction and future conduct of such monsters, for not even their own drivers can do that. And in the face of a procession of them the wise may well blunder, the brave falter, the resolute waver, and the swift be too slow. Mr. Haddock himself is of an athletic habit, a cool thinker, accustomed to danger, a good

runner and jumper; but still his equipment was not enough to save him from a mauling. What precautions then can avail the aged and infirm, the deaf, the halt, the nursemaid, and the child? If Mr. Haddock had been manifestly lame no jury would have excused Mr. Thwale for knocking him down; but the motorist is no more entitled to murder a man with two legs than a man with one. We all have a right to expect that people will not deliberately let loose mad dogs in the streets, expose us to the assaults of tigers, or go about with dangerous explosives which they are unable to control; and if they do these things they do them at their peril. Mr. Thwale has brought on to his own property and allowed to escape from it on to the public highway, which in a sense is the property of Mr. Haddock, as of all the King's subjects, a dangerous instrument 'which was not naturally there, harmless to others so long as it was confined to his own property, but which he knew would be mischievous if it got out. *But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there.*'

It has been argued before us that his act is one sanctified by long popular usage; but we are concerned, not with popular usage, but with the law. The fact that this point of law has never before been brought to the notice of this Court does not deprive it of substance. Lord Mildew said, in *Staggers* v. *The Metropolitan Water Board*: 'There

can be no prescriptive right to murder or maim the King's subjects.' We sometimes laugh at our ancestors, who insisted that a red flag must be carried in front of every motor-car ; but we begin to see that there was something in it. At any rate that precaution throws some light upon the juridical character of the motor-car at its birth, and nothing, so far as we know, has happened to alter it.

An act of wanton defiance or wilful carelessness in the injured party might be a circumstance which would justify a reduction or even denial of damages ; but prima facie the owner of the wild beast, as we hold this motor-car to be, is liable for the consequences of his rash act. In any case we find nothing of the sort here. Mr. Haddock, while lawfully crossing the road, was injured by a dangerous and uncontrollable monster, which had been released by the act of the respondent ; and he must receive damages of five thousand pounds. We order the motor-car to be destroyed.[1]

Plush, L.J., and *Poppitt, L.J.*, concurred.

[1] A pleasing reversion to the old law of ' deodand,' under which a personal chattel which had been the immediate occasion of the death of any reasonable creature was forfeited to the Crown, to be applied to pious uses, as e.g. where an adult (but not an infant) fell from a cart or horse and was killed. See *Maltravers' Case* (1 Bole—1731) in which a homicidal bull was *held* not liable for forfeit, the deceased being a woman.

(IV) REX *v.* BLOGGS

What is Education?

THE Court of Criminal Appeal gave judgment in this case to-day, which arose out of the conviction of a canal-boatman for failing to send his children to school.

The Lord Chief Justice said: This case is simple but important. The appellant, Samuel Bloggs, is a boatman owning and navigating a pair of boats (erroneously described by Sir Ethelred Rutt as barges) on the Grand Union Canal. Mr. Bloggs is a married man and has three children, who reside with their father and mother on the two boats, which are loyally entitled *George* and *Mary*. Mr. Bloggs was summoned by the Education Authority of the County of Middlesex for failing to send his children to a school for the purpose of receiving elementary education, and he was committed.

It has to be remembered that, if the prosecution is successful, the defendant's children will be educated free of charge. The prosecutors, therefore, are wantonly seeking to increase the public expenditure. It is difficult to see why, in the present state of the national finances, the children of a class already too prolific should be educated

for nothing. If a man can afford beer, tobacco, and entertainment, and a weekly contribution to a trade union, he can afford to contribute something weekly towards the education of his children. The State at one time could well afford to educate them, but it can well afford it no longer, and therefore we must look with particular suspicion on any attempt to increase the burdens of the State in this respect.

Now in the course of his trade or occupation as a carrier of goods or raw materials, Mr. Bloggs travels continuously up and down the canal between Birmingham and London ; and he put forward the reasonable defence that it was difficult for him to send children who were constantly in motion to a school which remained stationary. He also questioned the right of a Middlesex authority to intervene in the private affairs of a family which spent more than half the week in Warwickshire and other counties. But a defence founded on nothing more than reason and practicability was easily brushed aside by a public authority, and Mr. Bloggs was driven to that second line of defence which has perplexed and divided the Courts below.

' What is Education ? ' says Mr. Bloggs. But it is not necessary for this Court to add one more to the many answers which learned men have made to that question. The question for us is, What is meant by Elementary Education in the Education

Acts of this country? We find, after careful research, that the expression 'elementary education' is nowhere defined in that long series of statutes. The omission is a wise one, for the notion of what constitutes elementary education must obviously vary in every age, country, and class. But, though Parliament has been discreetly vague, the Court in this case is compelled to be definite. The respondents ask us to say that by elementary education is meant education in those elementary subjects which are ordinarily taught to our defenceless children, as reading, writing, and arithmetic. But it has been argued for Mr. Bloggs that the words mean education in the elements or first parts to be learned of any subject which may be useful or necessary to the good citizen in that state of life for which he is destined by Providence, heredity or inclination.

Now the children of Mr. Bloggs, though they have not attended a school, have already acquired the rudiments of their father's and grandfather's trade, that is to say, the handling of boats and the navigation of canals; they are able in an emergency to steer a boat into a lock, to open or close a lock-gate, to tie bowlines and reef-knots, clove hitches and fisherman's bends, and to do many other useful and difficult things which the members of this Court, we admit, are unable to do. Further, it is common ground that the children are healthy, sufficiently fed, well-behaved, and attached to

the life of the water, as their forbears for three generations have been. Mr. and Mrs. Bloggs are instructing them slowly in reading and writing, and even, with reluctance, it seems, in arithmetic. It is not contended that in these subjects they are so far advanced as children of the same age who attend the public elementary schools ; on the other hand, the evidence is that those children are quite unable to make a bowline-on-a-bight, to distinguish between the port and starboard sides[1] of a vessel, or to steer the smallest boat into the largest lock without disaster, while in health, discipline, manners, and practical intelligence they are inferior to the little Bloggs. Standardized themselves according to a single pattern, they conceive it their right and duty to take offensive notice of any person who seems to them to be unusual, a man with long hair or a woman with a short skirt. The Bloggs children do not shout, ' Oy ! ' at passing strangers, as do increasingly the ' educated ' children of the shore ; they are more courteous to persons and more respectful of property. They do not commit what are called, it appears, ' runaway-rings ', steal flowers from window-boxes or apples from trees. They exhibit the same good manners and gentle bearing as their parents ; and since they are not in constant attendance at the cinema their speech is uncorrupted by the slang or accent of Chicago.

[1] Cf. *A King by Night*—' Her green port light '—Edgar Wallace.

Now Mr. Herbert Spencer said that if we give our pupils the knowledge which 'is of most worth'—that is, the knowledge which has indispensable practical value in regulating the affairs of life—we shall at the same time give them the best possible mental training. And Mr. Bloggs (who by the way can read but not write) is an unconscious follower of Mr. Spencer. It may well be that our education authorities exaggerate the value of reading, writing, and arithmetic as aids to citizenship. In these days a person unable to read would be spared the experience of much that is vulgar, depressing, or injurious; a person unable to write will commit neither forgery nor free verse; and a person not well grounded in arithmetic will not engage in betting, speculation, the defalcation of accounts, or avaricious dreams of material wealth. At any rate it will not be denied that the spread of these three studies has had many evil and dubious consequences. But the practice of navigation is at the bottom of our national prosperity and safety, and has played no small part in the formation of the British character. The charge against Mr. Bloggs is that he has given his children an elementary training in the arts of this noble profession to the neglect of certain formal studies which are not essential to a virtuous, god-fearing, and useful life in the calling of their forefathers. They are unable, it is true, to read fluently the accounts of murder trials in the Sunday news-

papers ; they cannot write their names upon walls and public monuments ; they do not understand the calculation of odds or the fluctuations of stocks and shares. But these acquirements may come in time. Meanwhile, as day by day they travel through the country, the skies and fields of England are their books, their excellent parents are their newspapers, and the practical problems of navigation are their arithmetic. As for writing, there is too much writing in our country as it is ; and it is a satisfaction to contemplate three children who in all probability will never become novelists or write for the papers.

It cannot have been the intention of nature, which fashions the flowers and fishes in such variety, that Men, the noblest works of nature, should be all exactly alike, shaped in the same mould and fitted to the same ends. But that, it appears, is the principle which has prompted this prosecution. What is in the mind of the Education Authority, however, is no great matter. The short point in this case is that Parliament does not support them. Parliament has nowhere said that the first essentials of an elementary education are reading, writing, and arithmetic. I hold therefore that Mr. Bloggs, who is carefully, lovingly, and without cost to the State equipping his children for a useful career, is providing for them an ' elementary education ' within the meaning of the Acts. He was wrongfully convicted and the appeal must

be allowed. Costs to Mr. Bloggs, and a lump sum of one hundred pounds by way of compensation for his time and trouble.

Wool, J., and *Batter, J.*, concurred.

(V) REX *v.* 'THE COLONEL', 'SEER', 'PATHFINDER', 'OLD JOE', 'AJAX', GILBEY, WALLACE, AND THE RACING CORRESPONDENT OF *THE TIMES* NEWSPAPER

The Fortune-Tellers

(*Before Mr. Justice Wool*)

AT the Old Bailey to-day the Attorney-General, Sir Antony Dewlap, opened the case for the prosecution in the Fortune-Telling case. He said: Milord, the prisoners in the dock are charged under section 4 of the Vagrancy Act, 1824, with pretending or professing to tell fortunes. Under that Act, milord, any persons using any subtle craft, means, or device, by palmistry, or otherwise, to deceive the people are rogues and vagabonds and punishable with imprisonment and hard labour. In a previous case to-day a woman named Sibylla was tried and convicted for pretending to tell fortunes by means of palmistry; yesterday a gipsy woman was sent to prison for professing to tell fortunes by means of playing-cards. The prisoners in the dock are charged under the same section of the same

statute ; and, though in appearance they are more respectable than the individuals I have referred to, they are equally obliged to obey the law, and the essence of the offence with which they are charged is the same.

Milord, the essence of that offence is the deception of the people by a person pretending to have the power to predict the future. The laws of England have for many centuries regarded with jealous suspicion any claim of that kind. Our judges and legislators, knowing by long experience how difficult it is for mortal man to give a correct and accurate account of what took place only a few weeks ago, will not believe that mortal man can give correct accounts of that which has not yet taken place at all.[1] By a statute of Queen Elizabeth's reign, repealed in 1863, false prophecies were punishable as misdemeanours, as raising enthusiastic jealousies among the people and terrifying them with imaginary fears. If the prophet Isaiah were to appear in London to-day he would be at once arrested. Foresight, milord, is a quality which wins applause for the citizen, provided that he looks forward to his own future only and does not pretend to see into other people's. The distinction is perhaps a fine one——

The Judge : Not at all, Mr. Attorney. It is very

[1] See *Simon's Case* (1731) in which the prisoner travelled about the country crying ' Your food will cost you more.' He was whipped at Pennyfields and stood in the pillory at Chancery Lane three days.

simple. I may look into my own bedroom, but I must not look into a lady's. (*Laughter.*)

The Attorney-General: Ha! Very good, milord. A matter of property.

The Judge: No, no, propriety. (*Laughter.*)

The Attorney-General: Your lordship is exceedingly witty and well-informed. But, with great respect, milord, that is not exactly the basis of the offence; otherwise it would be equally dangerous to give an account of other people's pasts——

The Judge: It very often is. (*Laughter.*)

The Attorney-General: Milord, the prisoners in that dock have for many years been earning a livelihood by pretending to tell the fortunes or predict the futures, not of men and women, but of horses. They vary in method, in prose style, in confidence, and in popularity; but they have this in common, that they do hold out to the people who read their newspapers that they are able, by some special gift or power or information, to predict with something approaching to certainty the future conduct and fortunes of race-horses. It will be proved in evidence, milord, that for these predictions, which are issued daily—even, I regret to say, milord, on the Sabbath Day—they receive money; and that numbers of the people are deceived by their pretensions, act upon their predictions, and suffer damage. Some of the prisoners, milord, to take an example, have already

predicted that a horse named Diolite will win the Derby.

The Judge: What is the Derby?

The Attorney-General: Milord, the Derby is one of the most popular horse competitions, in which colts of—— (*The Attorney-General here conferred with the Solicitor to the Treasury and continued*): Milord, I am instructed that both colts *and* fillies of the age of three years take part in this race, and that considerable sums of money are wagered upon the event.

The Judge: Is it one of these trotting-races?

The Attorney-General: No, milord, it is a galloping-race. Now, milord, in the eyes of the law there is no distinction between a man and a horse——

The Judge: Have you any authority for that, Sir Antony?

The Attorney-General: I mean, milord, for fortune-telling purposes. The woman Sibylla was sent to prison for telling a police-officer that he would have good fortune and travel abroad, that a large sum of money was coming to him, that he would go a long journey and meet a dark lady in a foreign capital. Can it be said that that man is less deceitful and dangerous who tells the people that such-and-such a horse will start from a given place at a given time, travel a given journey, and arrive at a given destination in advance of thirty other horses selected from a large number for their

swiftness and staying power? The jury may well think that the latter set of prognostications is the more difficult to justify. For the conduct and career of the average man obey certain laws of probability and reason——

The Judge: Did you say 'man' or 'woman'? (*Laughter.*)

The Attorney-General: 'Man', milord. (*Laughter.*) Most of us, for example, have, in fact, gone a long journey and met a dark lady in a foreign capital. But the behaviour of horses, as the expert witnesses will presently testify, appears to conform to no known laws, either of reason, psychology, or mathematical probability. Their actions are impulsive, capricious, and incalculable; their health is delicate, their nervous system easily disturbed, and their moral sense negligible. The merest straw is sufficient to upset their temperaments and the hopes which human beings have formed concerning them. And this is especially true of those highly-bred and sensitive animals who compete professionally in the public horse-races. We shall hear in the course of this case, milord, of certain horses called 'favourites'—horses, milord, which because of their parentage, their past performances and the known ability of the jockeys who are to ride them, are confidently expected by a majority of the persons interested to defeat all the competitors in this race or that. But we shall also hear that it is comparatively a

rare event for the so-called 'favourite' to finish first; and in fact, milord, he (or she) has been known to finish among the last, so many are the chances and accidents which in a race between horses may disappoint even the unanimous expectations of a people. Yet these are the animals, milord, whose fortunes the individuals in that dock have pretended to tell.

The Judge: Do you say, Mr. Attorney, that the prisoners have never made a prediction which proved to be correct?

The Attorney-General: No, milord; there have been cases——

The Judge: Then if the essence of the offence is the deceit, these cases must be placed to their credit.

The Attorney-General: No, milord; with great respect, milord, they are an aggravation of the offence. For the rare occasions on which the prisoners are right tend to persuade the people that they have special powers and will be right again; and, in fact, milord, these occasions are carefully recorded and advertised for the purpose of encouraging that belief. Boastful placards, milord, such as 'Who gave you that Nap?'——

The Judge: What is a 'Nap'?

(The Attorney-General conferred with the Treasury Solicitor.)

The Attorney-General: A 'Nap', I am instructed, milord, is a prediction made with such exceptional

confidence that the person addressed is advised to go 'Nap' upon the indicated horse; that is, milord, to put his shirt on it——

The Judge: Is that what is meant by a horse carrying weights?

The Attorney-General: No, milord.

The Judge (impatiently): It is all Greek to me. Go on, Sir Antony. Please don't waste time.

The Attorney-General: Milord, at a later stage I shall ask you to find different degrees of guilt among the prisoners. The prisoner from *The Times* newspaper, for example, has never, I believe, gone so far as to offer his readers a 'Nap.' His method is, milord, to discuss the history and idiosyncrasies of the various horses in prose of a thoughtful and delicate style; and in conclusion he will write, after a hint of diffidence, some such phrase as, 'I must therefore take Beetroot to win'. A more modest formula, milord, than the 'Nap'; but in essence, according to the prosecution, it is the same, that is to say, a prediction that Beetroot will be successful, a pretended telling of Beetroot's fortune. Indeed, milord, there is some evidence that the restraint and quietness of this man's prophetic utterances have induced in the public a greater confidence than the boastful purveyors of 'Naps' and 'Doubles' have been able to do; that is to say, the section of the public which he addresses are made ready to bet, and therefore, in the end, to suffer damage. Nevertheless, milord,

you may be prepared to consider, in mitigation of sentence, the care and beauty of this man's prose.

The Judge: What exactly is a bet? What is the procedure?

The Attorney-General had not concluded his address when the Court adjourned.

(VI) TYKE *v.* TYKE

The Magic Hour

THIS unusual action was concluded in the Probate, Divorce, and Admiralty Division to-day.

The President, giving judgment, said: This distressing case is a suit for restitution of conjugal rights by Charlotte Tyke, *née* Charlotte Watts. Mr. Edwin Tyke, the respondent, has already been tried and convicted at the Old Bailey for that he did bigamously contract a marriage with Eliza Perkins, he being already married to Charlotte Watts. Mr. Tyke has never denied that on the 15th April, 1914, he went through the form of marriage with Miss Watts, or that, on the 1st December, 1925, he married Miss Perkins. But he maintains that the former marriage is null and void according to law. The Assize Judge and Jury, however, did not take that view, and Mr. Tyke has only recently emerged from prison. Not even his meditations in prison have inclined him to return to the unfortunate Charlotte; and she, with that feminine tenacity in the pursuit of an undesirable object which must always be a source of wonder to the wiser sex, has called upon the law to restore him to her.

Now the evidence is that these two persons were married at St. Margaret's, Fish Street, by the Venerable Archdeacon Wagshott. It is not everybody who is married by an archdeacon, and it is a circumstance which might be expected to confirm rather than detract from the validity of a wedding. The church was prettily decorated with flowers; the choir (engaged by Mr. Tyke without thought of the cost) sang two or three appropriate hymns, and one, less appropriate perhaps, concerning the somewhat irregular alliance for which the Garden of Eden is famous. The Archdeacon delivered a brief homily to the happy pair, a great number of well-dressed and well-known people were present, and the reception took place at Susan, Lady Shapwit's, house in Park Lane. Everything that ceremony, goodwill, champagne, or money could do to bless and speed the nuptials of the happy pair appeared to have been done. But there was one little flaw.

The marriage, through some accident, was solemnized at ten minutes past three in the afternoon; and it is the law of England that a marriage shall not be solemnized after three p.m. This quaint, unnecessary restriction is not found in any other civilized country; it does not apply in this country to the marriages of Jews, and it cannot be said to have any deep religious or moral significance. Any one who did say that would be making a great ass of himself. For the fact is, as any one

may learn who cares to study the Second Reading Debate on the Marriage (Hours of Solemnization) Act, 1886, the thing is an historical accident, or rather a jumble of historical accidents, such as have often been responsible for insane but enduring contributions to our laws. Some trifle impels some law-making busybody to action; the busybody perishes, the trifle is forgotten, but the law remains: and later generations magnanimously invent a moral principle to account for it.

The old direction of the Canon Law that a marriage should take place before noon was intelligible; for it was the desire of the Church that the parties should receive the Holy Communion at the time of their marriage, and it followed that they must be married within the canonical hours for the celebration of the Eucharist, that is, between sunrise and noon. But, the rule of the Canon Law having been abandoned by Parliament in 1886, the hour of three has no more religious significance than the hour of six or seven. The reason for that abandonment was a quaint one. In those days it was necessary for registrars to be present at the marriages of Nonconformists, who were in many ways regarded as a sort of wild beast. In some districts these monstrous alliances were so numerous that it was found impossible for the registrars to attend them all before noon. The spectacle of the weary registrar panting across the countryside on a bicycle from one Nonconformist

union to another ; the spectacle, on the other hand, of the Nonconformist bride waiting radiant at the chapel door for the arrival of the registrar only to be disappointed by the arrival of noon, excited the compassion of a Member of Parliament. He introduced to Parliament a measure to extend the lawful hours of marriage to four p.m. The Home Secretary of the day appeared to be under the erroneous impression that the limitation of hours was a part of the legislation of the eighteenth century against clandestine marriages, and that its only purpose was to avoid fraud or coercion by securing the healthy publicity of daylight. He was duly informed that the authority for the limitation was the Canon Law and the reason for it that which I have already stated. Nevertheless, he insisted that it was desirable that weddings should take place in the hours of daylight, and he observed that in the north of England, in the winter-time, it was often dark before four p.m. He therefore, on behalf of the Government, offered to give facilities to the Bill provided that the mover would accept as an amendment the hour of three instead of the hour of four. To this the mover, somewhat reluctantly, agreed. It does not seem to have occurred to him or to the Home Secretary that if daylight and darkness were the governing considerations the hours of marriage might well be permitted to vary according to the season of the year, as the hours of lighting-up time do to-day, and presumably did then.

Such is the history of our present law. It is founded neither on religion nor reason, but on the dictum of a Home Secretary that ' in the north of England in the winter months it is often dark before four p.m.'. From which assertion the conclusion was drawn that all members of the Church of England, in all parts of England and Wales, at all seasons of the year, ought to be married before three o'clock in the afternoon.

It is impossible at the present date to imagine a sensible defence for this unique piece of legislation. A man may lawfully be buried at any time of the day or night ; yet on the face of it the burial after dark must be as least as liable to criminal abuse as the wedding after dark. Nor are we living in the turbulent society of the eighteenth century. The danger of a forced wedding, conducted at pistol-point in the dead of night, is not likely to disturb the repose of our innocent girls, whatever the hours permitted by the law. ' *Cessante ratione legis cessat ipsa lex*,' says an old legal maxim, or, ' When the reason for a law perishes the law itself perishes ' ; but this, unhappily, is seldom or never true. Further, the hours of daylight between one p.m. and four p.m., during which the majority of marriages are solemnized and celebrated, are those in which by common consent the vital spark is dimmest among men. They are, in short, the hours of the day least suitable to the celebration of the most vital of all ceremonies.

Lord Mildew said in *Baxter* v. *The Grand Junction Canal Co.*: 'It is impossible to be really merry at half-past three in the afternoon.' And the psychologist or cynic may well connect this law with the atmosphere of depression and disillusionment which often surrounds our English weddings, and indeed with our declining marriage rate. Further, it must seem odd to any reverent mind that an ordained clergyman should be forbidden by law to give his blessing except between certain specified hours, as if he were a public-house. But of such are the laws of England, and, however lunatic, this is the law.

The question is: What is its effect in the present case? After the reception the couple departed on what I understand is called a 'honeymoon' to the Continent. The difficulties and irritations of foreign travel, the fatigue and loss of temper which are attendant upon a hurried inspection of Italian picture galleries and churches, had a not uncommon result: Mr. Tyke, in spite of the Archdeacon's address, formed a strong dislike for his unfortunate wife. On their return to England they were waited upon by an emissary from the Bishop of the diocese, who, having heard of the irregularity of their union, was greatly distressed and desired them to be married again at the proper time of day. Mrs. Tyke was willing enough, but Mr. Tyke—than whom, surely, there can be no more unfeeling monster alive—Mr. Tyke refused. He regretted,

he said, that through an error of judgment he had taken Charlotte to be the partner of his life, and since it appeared that he had done no such thing it would be an act of gratuitous folly to do it again. Providence had come to his aid, and to refuse the gifts of Providence was proverbially foolish. A personal entreaty by the Bishop had no better result. To him Mr. Tyke impudently quoted the old legal maxim '*Ignorantia facti excusat*' or, 'A mistake of fact may excuse an innocent party to a contract'.[1] He said that he had been mistaken (perhaps deceived) on a question of fact, namely, the charm and temper of Charlotte, and that though his contract were validly made, he would be excused from carrying it out.

Now by the Provisional Order (Marriages) Act, 1905, a Secretary of State may make a Provisional Order to remove invalidity or doubt in the case of marriages solemnized in England which appear to him to be invalid or of doubtful validity. And such an order was obtained by the Bishop from the Home Secretary. But that order must be confirmed by an Act of Parliament. Mr. Tyke, who had friends in Parliament, announced that he would oppose the confirming Bill. Mrs. Tyke shrank from the humiliating publicity which must

[1] *Ignorantia facti*: see *Mouldy* v. *Mitchell* (1929), 2 H.L., where a member of the Athenaeum was found asleep in a tree and sent to the Zoo. It was *held* that the Curator of the Zoo was not liable, having accepted and detained the plaintiff under an honest mistake of fact.

result, and, still hoping to win back her husband by weeping and protestation, implored the Home Office to let the matter drop, which they did. They are naturally reluctant to resume it after this long interval and in the present press of public business. Charlotte, in despair, has turned to the Courts of Law, and I have to say whether her Edwin should be ordered to return to her.

I cannot discover that the question has ever been raised in a Court of Law. Counsel for Charlotte Tyke quoted the dictum of a Bishop that, while the officiating clergyman in such a case is subject to pains and penalties, the marriage itself is valid, on the ground, presumably, that the Divine grace cannot be subject to the fluctuations of Greenwich Time (as adjusted by the Summer Time Act). But Bishops, unfortunately, are not judges. And, on the other hand, we cannot ignore the action of the Bishop mentioned in the present case, who clearly was of opinion that the marriage was invalid; for, if it were valid, there was no point in the parties being married again. All that was necessary was to punish the Archdeacon. Nobody, it appears, has done this, nobody attaching sufficient importance to the nonsensical statute. Then there is the conviction for bigamy, which seems to imply that the first marriage was valid. But this, again, does not assist me much; for it is conceivable that the Assize Judge and Jury, having

no special knowledge of the problems of matrimonial law, were wrong.

What, in the simplest terms, is the position? A contract has been made unlawfully and I am asked to enforce it—and to enforce it by ordering what is called specific performance. Now there is no department of affairs in which our Courts are prepared to do that. A contract unlawfully made may have certain consequences; for example, the Court will punish an act of fraud which went to the making of it. But a Court of Law must obviously refuse to assist either party to carry out an unlawful contract. Lord Mildew, in the case of *Wagg* v. *The Chief Constable of Ely*, has ably pointed out certain similarities between a gaming contract and a contract of marriage; and the same parallel is of assistance here. The Court will not enforce a gaming contract (lawful or not), whatever it may think of the party which repudiates it. It is a debt of honour. And Mr. Tyke has contracted a debt of honour which he refuses to pay. We can record our loathing of the man, but we can do no more. The petition is dismissed.

Further, it is assumed by the Court that the reasonable man foresees and contemplates the natural and probable consequences of his own acts of folly; and the same assumption must charitably be made in considering the Acts of Parliament. It cannot be supposed that Parliament, when it says that such-and-such a contract shall not be

made, intended to say that if that contract were made it should be valid and enforceable. It does not, for example, say that bank-note forgery is unlawful but that a forged bank-note shall be as good as a genuine one. *Jus ex injuria non oritur.* Evidently it meant that if a man is not married before three he is not married at all. Eliza Perkins, therefore, is Mr. Tyke's lawful wife and he was wrongfully convicted of bigamy. The woman Charlotte has suffered, but I cannot help that.[1] I shall recommend that he receive a free pardon for an offence which he never committed; and to those young persons who are anxious to marry but are uncertain of the durability of their affections I recommend that they arrange for the ceremony to take place at three-fifteen. They will thus enjoy all the romance and respectability of marriage and be able to escape from it without the scandal of divorce. Costs to Charlotte Watts.

[1] Cf. Bracton: '*De feminis non curat lex.*'

(VII) SPARROW *v.* PIPP

Rebellion in the Lords

JUDGMENTS of a startling nature were delivered by the House of Lords to-day in this appeal, which was the sequel to a political libel action.

The Lord Chancellor said: My Lords, in this appeal we are called upon to make decisions whose consequences may reach out far beyond the lives and fortunes of the particular parties in the case.

The appellant, Mr. Sparrow, was a candidate at a Parliamentary Election, and his opponent was Mr. Pipp. In the course of a controversy between them concerning the fiscal policy of these islands Mr. Pipp saw fit to say, or suggest, that Mr. Sparrow was a crook, a divorced person, and in general unfitted morally to be the Parliamentary representative of Bogton Parva. Mr. Sparrow was defeated at the polls and brought an action for defamation.

Now the statements complained of were made at a public meeting by word of mouth and not committed to writing. I have had occasion before to comment on some of the strange, illogical, and

antiquated features of our law of libel. One of the strangest is that distinction between slander and libel by which the spoken word, however offensive, is not actionable unless the victim can prove that he has suffered special or actual damage. There are exceptions to this rule, as, for example, where imputations are made against a woman's honour. But the honour of a man is held by the law to be of less importance. If Mr. Pipp had written on a postcard, 'Mr. Sparrow is a crook', Mr. Sparrow would have had a clear cause of action, but since it was shouted at a public meeting he has to show not only that the words are defamatory but that they have caused him actual damage. That is undoubtedly the law as it stands to-day.[1]

At the trial of the action before our learned brother Mr. Justice Wool, Mr. Sparrow was unable to produce any evidence of special damage, for it appears that accusations of the kind complained of are such common currency in political life that few of the electors had taken much notice of them, and in any case it was impossible to prove that but for those accusations Mr. Sparrow would have been elected. Counsel for Mr. Pipp therefore very properly submitted to the Judge that there was no case to go to the jury. There then followed an

[1] See *The Bishop of London* v. *Beckett* (1921,) 2 H.L., where the defendant, in the course of a wireless 'Talk', said, 'My Bishop is nearly *always* sozzled.' It was *held* that no action would lie, because the words had not been included in the type-written MS. of the 'Talk' and were not actionable *per se*.

event without precedent in the judicial history of our land. Mr. Justice Wool defied the law.

We learn from counsel who were present that the day was hot and sultry. There had been a thunderstorm and there was the threat of further atmospheric disturbances in the air. Our learned brother throughout the hearing had shown marked sympathy with Mr. Sparrow and had once or twice expressed his loathing of the offensive and, it appears, inaccurate Mr. Pipp. Further, our learned brother was suffering from hay-fever and had given signs of a nervous irritability which is rarely found on the Benches of our land. And in response to the learned counsel's submission he used the following words, which I read with some reluctance from the shorthand report:

'Stuff and nonsense, Sir Ethelred! Yes, I know all about *Shrike* v. *The Glassware Union*, and I know all about *Thurtle* v. *The Dean of Lichfield*—Usher, open that window, blast you!—I know what you say is the law, but it isn't *sense*. My hat, I'm going to sneeze again!' (The learned Judge here sneezed seven times.) 'Do you really think I'm going to sit here and administer a damn silly law like this? Put it to yourself, Ethelred, old boy. Do you really think at my time of life I'm going to let this absolute toad, tyke, thug, Mr. Pipp, get away with it just because of some footling decision in 1834? A-tishoo! He's

insulted Sparrow and he's got to answer for it. The case must go on. Usher, another handkerchief. A-tishoo! Oh, hell!'

The case then proceeded. The jury found for Mr. Sparrow and awarded him heavy damages. Mr. Pipp appealed upon the point of law, and the Court of Appeal, fortified by many decisions of your Lordships' House, were easily persuaded to allow the appeal, holding that the learned judge had done wrong in allowing the case to go to the jury.

Mr. Sparrow appealed; and it is now for your Lordships' House to say whether we are for common sense or for the Common Law. That is the naked issue, unwelcome though it must be to any member of our honourable profession. Now what is the Common Law? It is a body of principles, customs, doctrines, rules, and decisions not made by Parliament but handed down from Court to Court, from Judge to Judge, through many generations. In theory we have no such thing as Judge-made law. Whenever a question arises to which precedent can provide no definite answer the Court must make what is in effect a new decision; but that decision is supposed to follow necessarily from some established principle or doctrine, and the agreeable fiction is that that decision was there all the time, hidden and unborn in the inexhaustible womb of the Common Law.

My Lords, as you know, this is nonsense. The Judges of our land are constantly making law, and have always done so. The pity is that there is not more Judge-made law.[1] For most of His Majesty's Judges are much better fitted for the making of laws than the queer and cowardly rabble who are elected to Parliament for that purpose by the fantastic machinery of Universal Suffrage. To say that is not to say that the Judges of a hundred years ago are necessarily the persons best fitted to legislate for the circumstances of the present day. But that is the queer position to which our attachment to precedent has led us.

An English Judge, confronted with the decision of a superior Court that the earth was flat in law, would be bound by that decision, and in a similar case must give a similar judgment, though the members of that Court may have been defunct for fifty years and the circumstances which led them to that conclusion may have disappeared. In the present case your Lordships are bound by a fatuous decision of your Lordships' House in the case of *Thurtle* v. *The Dean of Lichfield* (2 A.C. 1834). My Lords, I confess that I incline to the same opinion as our learned brother Wool, much as I deplore the inelegance of his expressions. It is manifestly nonsense that a person who shouts a slander to a crowd of citizens should go free, while

[1] Cf. Bracton: '*Judicis est jus dicere non dare, hinc illae lacrimae.*'

he who writes an insult in a private letter may be brought to book. This is but one of the many follies and anomalies, founded for the most part on nothing but historical accident, in our law of libel.[1] Parliament might amend that law, but Parliament at the present time cannot be trusted to amend the laws which matter, for the sole concern of Parliament is to take away the citizen's money and prevent him from enjoying himself.

It is not for puisne Judges such as our learned brother Wool to amend the law—and, making due allowance for the effect of thunder and hay-fever, I feel bound to associate myself with the lengthy rebukes already administered by the Court of Appeal; but your Lordships have the power to amend the Common Law, provided that you are willing to abandon in some degree the devoted and mechanical adhesion to precedent which has been for centuries the foundation of our judicial practice. For my part I am willing to take the risk; and I am not willing to be bound hand and foot by the observations of Lord Mildew made in 1834, a year, my Lords, in which the world was a very different place. Since Parliament has surrendered or forgotten its proper function, which

[1] In *Bede's Case* (1498) (K.B., 12 Hen. VII, fo. 22), defendant was owner of a 'Talking Horse' which continually asserted at the public fairs that plaintiff's wife was unfaithful. The King's Bench declined to hear him, on the ground that the jurisdiction in slander belonged to the spiritual courts. (And see Wedderburn on *Witches*).

is to keep the laws abreast of the times, your Lordships' House must, in my judgment, discharge that duty. So long as I sit upon the Woolsack, whenever an appeal discloses a divergence between the Common Law and common sense it will be my practice to be guided by the latter. We may as well begin with the law of libel. I hold therefore that our learned brother Wool, though inelegant and insubordinate, was right, and the appeal must be allowed.

One word more, my Lords. The question must soon arise: If we are prepared to amend the ancient Common Law, most of which is still sensible, what is to be our attitude to modern Statute Law, most of which is not? Nearly all the laws recently enacted by Parliament are vexatious and foolish, yet we are expected to enforce them as jealously as if they were necessary and good. My Lords, we are venerable, dignified, and wise, superior in almost every respect to the elected legislators of the House of Commons; yet, like the rest of His Majesty's Judges, we find ourselves in the position of hired dispensers, compelled continually to dispense the prescriptions of a crazy doctor, which they know to be ineffective and even poisonous. My Lords, is it good enough? My Lords, it is not. My Lords, I give notice that from this day forth it is my intention to decide such disputes as come before me in accordance with my own good sense and judgment, ignoring both

precedent and Parliament where they are opposed to me. As for the House of Commons, my Lords, the House of Commons be blowed !

Lord Lick, *Lord Arrowroot*, *Lord Pullover*, and *Lord Laburnum* (with some hesitation) concurred.

(VIII) REX *v.* PUDDLE

Blackmail

THE Hammersmith Blackmail Case was concluded at the Old Bailey to-day.

Mr. Justice Trout, addressing the jury, said: Gentlemen, this is a very grave case. The prisoner in the dock, a Collector of Taxes for the district of South Hammersmith, stands charged with the odious crime which is commonly described as blackmail. That expression dates from very early times, when it was the custom to pay tribute to men of influence who were allied with certain robbers and brigands for protection from the devastations of the latter. The practice was made illegal by a statute of Queen Elizabeth's time, and ever since it has been classed by our Courts among the most contemptible and dangerous offences. A person, who, knowing the contents, sends or delivers a letter or writing *demanding with menaces and without reasonable cause* any chattel, money, or other property, commits felony and is liable to penal servitude for life. The menace, the 'putting in fear', as our ancestors expressed it, is of the essence of the crime. The spectacle of one man demanding money from another must always be

painful to the civilized mind ; but when in addition that other is made to fear for his safety, liberty, or reputation the law steps in to protect and punish.

Now Mr. Haddock, the prosecutor in this case, received a letter from the prisoner demanding money. The letter was printed in ink of a bright red colour, and that is a circumstance which you may well take into account when you come to consider the intention of the letter and the effect which it may have had upon the mind of the recipient. For red is notoriously the colour of menace, of strife, of bloodshed and danger ; and it is worthy of note that the prisoner's previous communications to Mr. Haddock had been printed in a quiet and pacific blue. The letter was as follows :

> ' Previous applications for payment of the taxes due from you on the 1st day of January, 1930, for the year 1929–1930, having been made to you without effect, DEMAND is now made for payment, and I HEREBY GIVE YOU FINAL NOTICE that if the amount be not paid or remitted to me at the above address within SEVEN DAYS from this date steps will be taken for recovery by DISTRAINT, with costs.
>
> ' E. PUDDLE, *Collector* '

' Collector ', I may observe in passing, was in other centuries a word commonly used to denote

a highwayman.[1] But you will not allow that point to influence you unduly.

Now the 'demand' is clear; indeed the word, as you will notice, is printed in block capitals. And you have to say, first of all, whether or not that 'demand' is accompanied by menaces. You will take everything into consideration, the terseness, I had almost said the brutality, of the language, the intimidating red ink, the picking out in formidable capitals of the words 'DEMAND', 'SEVEN DAYS' and 'DISTRAINT', and any other circumstance which may seem to you calculated to cause alarm in the mind of the recipient. You will observe in particular the concluding words, 'Steps will be taken for recovery by DISTRAINT, with costs.'

'DISTRAINT.' What is the exact meaning of that? It means the forcible seizure of a person's goods; it means the invasion of his home by strangers; it amounts to licensed burglary; it means the loss not only of favourite possessions but of reputation; it means distress to wife and

[1] In *Rex* v. *Strauss* (1928), 9 Cr. App., R. 91, a bailiff acting for the Inland Revenue was struck and killed with a book of sermons while removing a wireless set belonging to the accused, and two rabbits, the property of a favourite daughter. The defence was that distress for income-tax was a gross provocation comparable to the discovery of a wife in the arms of another (see *Rex* v. *Maddy*, 1 Ventris, 158), and such as to produce an uncontrollable impulse depriving a man of the ordinary powers of self-control. The jury, without leaving the box, returned a verdict of *Justifiable Homicide*, but the following day was Derby Day, and the decision is not regarded as settled law.

family, and it is significant that the correct and common term for the process is 'Distress'. Evidence has been given that a threat 'to put the bailiffs in' brings terror to any home. The prosecutor has sworn that at the sight of that one red word he experienced alarm; that he understood from the letter that, without opportunity to state his case in a court of law, his goods would be seized and his wife and family alarmed by the prisoner. The prisoner says that that was not his intention; that the words 'steps will be taken for recovery' indicated a preliminary summons to the Court. You may think that in that case he would have done better to print those words in the same large type as the word 'DISTRAINT'; and you may think, as I do, looking at all the circumstances, that the letter was deliberately planned and worded with the intention of creating alarm, and through that alarm extracting money from Mr. Haddock, who is a sensitive man.

You will then have to ask yourselves, Was this menacing demand for money made with reasonable cause? You will bear in mind that Mr. Haddock is not a debtor or criminal; he has not taken another's property or done any disgraceful thing. His only offence is that by hard work he has earned a little money; and the suggestion is now made that he shall give away a fifth part of that money to other people. That being his position, you

might well expect that he would be approached not with brusquerie but with signal honours, not with printed threats but with illuminated addresses. But the whole tenor of the prisoner's communications suggests that in his opinion Mr. Haddock is a guilty person. Observe the strange use of the word 'recovery'—as if Mr. Haddock had *taken* money from the prisoner. Mr. Haddock has made repeated protests to the Collector and to his confederate, the Inspector, urging that even under the strange customs of our land the sum demanded of him was excessive, that due allowance had not been made for the particular hardships and expenses of his professional calling, and that in his judgment the prisoner and his principals have taken from him during the past years money which they ought in conscience to restore. While this dispute was still proceeding the prisoner sent this letter. Mr. Haddock, a public-spirited man, conveyed the letter to the police, and it is for you to say whether he was right. An official from the Inland Revenue Department has drawn your attention to the difficulties of a Mr. Snowden, the prisoner's principal, it appears, who is in need of money. You will pay no attention to that. We are all in need of money; and if Mr. Snowden has an insufficient supply of money he must spend less money, as the rest of us have to do. Neither his avarice nor his extravagance can excuse a breach of the law.

The jury eagerly found the prisoner guilty of blackmail, and he was sentenced to penal servitude for life, and solitary confinement for ten years, the sentences to run consecutively. The Court congratulated Mr. Haddock.

(IX) REX *v.* THE HEADMASTER OF ETON

What are the Classics?

AT Windsor to-day, before a full Bench of magistrates, a serious charge was made against the Headmaster of Eton, a clergyman, who appeared to feel his position acutely. Police-Constable Boot gave evidence in support of the charge, which was preferred under the Obscene Publications Act, 1857, commonly known as Lord Campbell's Act.

Constable Boot said: On the fifth of this month, acting under instructions, I proceeded with a special warrant to the premises known as Eton College and made a thorough search of the same. I found and seized there a number of books which in my opinion were of an obscene character. Defendant admitted that the said books were kept on the premises to be 'sold, distributed, lent, or otherwise published' within the meaning of the Act, to the students under his charge, who are from thirteen to nineteen years of age, your worship.

The Attorney-General: Have you carefully perused the said books?

Constable Boot: I have.

Sir Ethelred Rutt (*for the defence*): Your worship, I have here a hundred and forty-nine professors and schoolmasters who are prepared to go into that box and swear that the volumes in question have not the character suggested.

The Chairman: What is the use of that? The defendant himself is a schoolmaster. In a charge of burglary the evidence of a hundred and forty-nine burglars would not persuade the Court that the prisoner was incapable of house-breaking.

Sir Ethelred: But, your worship——

The Chairman: We cannot admit this evidence. The question of obscenity is for the Court to decide.

Sir Ethelred: But, your worship, you have admitted the evidence of the constable.

The Chairman: That is different.

Sir Ethelred: How?

The Chairman: Do not be impertinent, Sir Ethelred. The constable is not a schoolmaster.

Sir Ethelred: Your worship, it is a principle of English law that an accused person is assumed to be innocent until he is proved to be guilty. In this case it appears that the defendant is assumed to be guilty, since he is summoned to show cause why the books in question should not be destroyed; yet he is not permitted to prove himself innocent, for the evidence of ignorant persons is admitted against him and the evidence of educated persons is not admitted in his defence. I protest.

The Bench: Sir Ethelred, you may protest.

Counsel then addressed the Bench.

The magistrates withdrew and did not return for several hours.

On their return *The Chairman* said: This is a very painful case. During our absence we have perused, with growing interest and disgust, a number of passages in the books complained of, and in particular a book called *The Classical Dictionary*, which is written in English. Many of the books are written in a foreign language with which we are not acquainted; some of these are accompanied by English translations, and some are not; but from the character of the former we are entitled to form certain conclusions as to the character of those volumes which no one has yet been bold enough to put into English.

The Classical Dictionary is a book of six hundred and forty pages and contains a very large number of legends or stories concerning so-called classical or mythological figures. I am glad to say that no one on this Bench has had a classical education, and we were therefore able to approach these volumes with an open mind. The magistrates on my right and left include a baker, a brewer, a farmer, and a distinguished banker, and, though none of us are professors or schoolmasters, Sir Ethelred, you will admit, I think, that we are as well able as other men to say what is fit and proper to be read by young persons.

Sir Ethelred: Certainly, your worship.

The Chairman: Now we are informed that the definition of obscenity laid down by Lord Cockburn in the case of *R. v. Hicklin* was as follows: 'I think the test . . . is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.' The last words are important. Not only the nature of the work but the circumstances of its publication, including its price, must be taken into account. A treatise on the passion of love, philanthropically intended and decently expressed, might be most unsuitable to be read by young persons, and if it were hawked in the streets for twopence might properly be condemned under the Act, but not if it were sold at a high price by reputable booksellers, in which case it would be most unlikely to fall into the hands of young persons.[1] But in the present case the publications complained of have been deliberately purchased and kept for the consumption of young persons, and young persons drawn exclusively from the aristocracy and the governing classes, whose duty it will be in future years to set an example to their less fortunate countrymen, to mould their minds and dictate their actions. Any conduct

[1] See *Chief Constable of Burbleton* v. *Woolworth* (1929) in which defendants published a sixpenny edition of the Plays of Shakespeare. The magistrates ordered it to be destroyed.

therefore which tends to corrupt and deprave those young persons must be held especially culpable.

We find unanimously that these volumes have such a tendency. The legends in *The Classical Dictionary* have a pagan origin and are largely concerned with pagan gods; and their amorous adventures and barbaric standards of behaviour form strange subjects of study for the pupils of a Royal College situated under the walls of a Royal Castle whose august occupant is head of the Established Church. We have read with particular repugnance the record of the alleged god, Zeus, whose habit it was to assume the shape of swans, bulls, and other animals, and, thus disguised, to force his unwelcome attentions upon defenceless females of good character. The case of the woman Leda, if it were published in the newspapers to-day, would arouse the indignation of every right-thinking Englishman; and we have no doubt that our leaders of thought would mobilize the conscience of the nation to prevent the repetition of such offences. But in these books we learn that, although the unfortunate woman became the mother of two eggs, the celestial profligate was permitted to proceed without public protest to the odious case of the woman Europa. No moral reproof is founded on these stories, no improving lesson is drawn from them; on the contrary, they are related with a callous indifference which, coupled

with the fact that the delinquent is of a divine or pseudo-divine character, must tend to suggest to the susceptible imagination of the young that such behaviour is defensible or even desirable. The boys of Eton must not be encouraged to dress themselves as swans or wild beasts for the purpose of idle and illicit flirtation ; but that can be the only effect of these deplorable anecdotes. Indeed, we learn without surprise that the Captain of the Boats was recently expelled for entering the Matron's bedroom disguised as a brown owl.

I could mention many other passages, only less disgraceful in that they relate the moral lapses of mortal men and not of gods—the case, for example, of the man Oedipus, who killed his own father and married his own mother. Then there is the revolting story of the woman Medea, who committed or was accessory to a number of atrocious murders. This woman, by false representations, induced the daughters of Pelias to cut their father in pieces and boil him ; she sent to a female rival a poisoned garment which burned the unfortunate woman to death ; she murdered her own brother and herself cut him into fragments ; she killed and (according to one account) devoured her own children ; but, so far from paying the due penalty of her crimes, she was then conveniently conveyed to safety in a chariot drawn by winged dragons. Strange food, this, for the tender minds of our growing

aristocracy. It must not be forgotten that the mind can be 'corrupted and depraved' in more than one direction; tales of parricide, fratricide, and infanticide are 'obscene' in the truest sense of the word; and all through these legends there runs a strain of violence and cruelty and bloodthirsty vengeance which is as harmful to the reader as the strain of irregular passion. It is idle for us to urge upon the newspapers and the makers of films the duty of reticence in their treatment of crimes and offences if our places of education are permitted to discuss them without restraint; and it may well be that the prevalent appetite of the poor for tales of murder and wrongdoing has its real origin in the schools and colleges of the rich.

We have been asked by counsel to take into account the innocent motives of the defendant, the artistic merits of the works in question and the long tradition which has admitted them as proper reading for the young. It was decided in the year 1868 that innocence of motive is no defence to a charge under the Act; and neither art nor custom can, in this court at least, excuse an offence against morals. We find that these books are corrupting and we order them to be destroyed. Fortunately we have only been called upon to consider a fraction of the so-called 'classics'; but after what we have seen we shall recommend to the proper authorities that a thorough survey be made of the

whole body of classical literature in order that our schools and colleges may be made safe for aristocracy. The defendant is severely censured and will pay the costs of the prosecution.[1]

[1] In a later case, *Rex* v. *Squire*, the defendant, a street-bookmaker, attributed his downfall to a volume of Catullus which he had picked up in the streets of Windsor.

(X) COWFAT *v.* WHEEDLE

What are Snails?

(Before Mr. Justice Wool)

THE hearing of this case, which raises a legal point of far-reaching importance to gardeners and horticulturists, was concluded to-day.

Mrs. Cowfat, who appears *in forma pauperis*, is suing her neighbour, Mrs. Wheedle, for alleged trespass and damage to property. Plaintiff and defendant live in adjoining houses in the suburb of West Munsey. Both are keen gardeners, and plaintiff alleges that defendant has made a practice of throwing snails and slugs over the dividing wall, thus damaging Mrs. Cowfat's plants and injuring her chances of gaining prizes at the West Munsey flower-show.

Mrs. Cowfat's cross-examination was continued this morning. The contrast between this witness's downright diction and counsel's polished phrases caused much comment.

Mrs. Cowfat: I seen 'er done it—see?

Mr. Swoot (Counsel for the defence): You say you saw the defendant transferring snails from her garden to yours?

Witness: I tell you I seen 'er done it. Can't speak plainer than that, can I?

Counsel: I put it to you that your story is a tissue of fabrications?

Witness: I seen 'er done it. And my clean 'olly-'ocks nothin' but 'oles from that day to this. More like a sponge, they was.

Counsel: Will you tell my Lord what time of day it was that you saw the defendant engaged in this manner?

Witness: Ask 'er 'oo it was won first prize for 'olly-'ocks, Mister.

Counsel: Answer the question, please, Mrs. Cowfat. What time of day was this?

Witness: Night-time, of course. Think she'd have the face to do it in the daylight? Nasty, creeping thing——

Counsel: Then it would be dark, Mrs. Cowfat?

Witness: Dark? I should say so. Gone half-past ten, because I'd 'eard Wheedle come back from the pub, singing somethink awful——

Counsel: Very dark?

Witness: You're right, Mister. And she's a dark one. If I was to tell you all I know——

The Court: You are here to tell all you know, Mrs. Cowfat, provided it is relevant.

Witness: Well, then, ask 'er what Wheedle said to the lodger the night he put 'im outside. Ask 'er 'oo it was fed 'er two cats, night and morning, when she went off Whitsun——

Counsel: One moment, Mrs. Cowfat. You have told my Lord that it was very dark. And yet it was not so dark that you were unable to see the defendant throwing snails over the wall?

Witness: I seen 'er done it.

Counsel: On the 18th May did you reprove defendant for putting salt on the snails in her garden?

Witness: That's right. Nasty cruel thing! Standing watching 'em shrivel. That's what put 'er against me.

Counsel: You disapprove of that method of immobilizing a garden pest, Mrs. Cowfat?

Witness: I seen 'er done it.

Counsel: Will you tell my Lord how you dispose of the snails in your own garden?

Witness: Never were no snails in my garden, Mister, not before Flo Wheedle began 'er dirty games.

Counsel: Oh! So there were no snails in your garden, Mrs. Cowfat, prior to the 14th of June?

Witness: You 'eard what I said.

Counsel: A very remarkable garden, Mrs. Cowfat, in its complete freedom from destructive gasteropods?

Witness: Remarkable? You oughter seen it last summer—first prize 'olly-'ocks, sea-kale and lettuce. *And* a second for geraniums.

Counsel: To what, Mrs. Cowfat, do you attribute your immunity from snails?

Witness: Patent fertilizers, Mister. Turns their stummicks and they don't come a second time.

Counsel: I put it to you, Mrs. Cowfat, that your immunity is susceptible of a more sinister explanation?

Witness: Pardon?

Counsel: I suggest to you that for many years past it has been your habit to transfer your snails to your neighbours' gardens?

A Woman in the body of the court: That's right.

Witness: Oh, you wicked man! Oh, how dare you! Say that again, Liz Roberts, and I'll tear your eyes out! (Witness here became highly excited.)

The Judge: Please control yourself.

Witness: All right, guv'nor. Only you wait till I get at 'er—see?

Counsel: Would you say, Mrs. Cowfat, that the snail was an animal *ferae naturae*?

Mr. Bottle (*Counsel for the plaintiff*)*:* Milord, I object!

Mr. Swoot: If me learned friend will have a little patience——

Mr. Bottle: The witness cannot be expected——

The Judge: I don't *quite* see where this is leading us, Mr. Swoot.

Mr. Swoot: Milord, it is the defendant's case that she did not in fact throw snails into the plaintiff's garden, and in the alternative that, if she did, they were snails which, so far as there can

be property in snails, were the property of the plaintiff, and, thirdly, that they were animals *ferae naturae* which the defendant had not brought on to her own property and therefore was under no obligation to keep upon her own property. Milord, in the case of *Rylands* v. *Fletcher*——

The Judge: Dear, dear! *Must* we have *Rylands* v. *Fletcher*?

Mr. Bottle: Milord, at the proper time I shall have a good deal to say about that case, which, in my submission, milord, is on all fours, milord, with the present——

Mr. Swoot: Milord, in that case it was held that a person who keeps a wild beast or dangerous thing upon his property is answerable for the consequences if that animal or thing escapes and does damage to the property of his neighbour; but, milord——

Witness: 'Ere, Mister——

The Judge: Do you distinguish, Mr. Swoot, between a destructive mammal and a destructive gasteropod?

Mr. Swoot: No, milord. But I distinguish between the cases. Milord, if my client had kept a tiger on her property she would be answerable for the consequences of its escape. But if a wandering tiger, milord, over which she had no control, were to come upon her property, I submit, milord, she would be entitled, milord, to take any steps which suggested themselves in order to

induce it to leave her property, even, I submit, milord, if she were to open the gate dividing her property from her neighbour's and persuade the animal by gestures to depart through that gate——

The Judge: An interesting point, Mr. Swoot, but does it arise?

Witness: Oy!

The Judge: Be quiet.

Witness: 'Ere, guv'nor, am I giving evidence or 'im? I seen 'er done it—wish I may die!

Mr. Swoot: Milord, I rely upon *Swabe* v. *The Ecclesiastical Commissioners*. Milord, the snails in defendant's garden were not brought there by her and are not under her control, being at liberty at any time to cross the wall into the plaintiff's garden. Milord, I ask you to rule that the snail is an animal *ferae naturae*——

The Judge: What has Mr. Bottle to say to that?

Witness: I seen 'er done it.

After further legal argument, his *Lordship* said: Mr. Swoot, you have conducted your argument with marked ability. The legal points involved are of considerable importance and complexity. The evidence discloses a long-standing feud between two neighbours; both of whom, as horticulturists, are naturally anxious to rid their properties of the destructive snail, which I hold to be an animal *ferae naturae*. It appears that the plaintiff, whose evidence was almost wholly unsatisfactory, has for long made a practice of transferring or urging

her snails into defendant's garden, since she has a feminine shrinking from the taking of life herself. The defendant, less sensitive, has destroyed them with salt, admittedly a painful and humiliating end. The plaintiff made adverse comments upon this practice, whereupon the defendant, according to the plaintiff, transferred them to her neighbour's property, from which, we may suspect, they were again ejected. We have a picture, therefore, of a state of affairs in which the snails of this neighbourhood have been changing their location with a rapidity to which they are quite unaccustomed. It is not too much to say that in West Munsey Villas it rains snails. If the evidence is to be believed, the snail war has spread beyond the original parties. The plaintiff suggests that many of her neighbours, taking the defendant's side, have conspired to collect their snails and deposit them in quite unreasonable numbers upon her hollyhocks. There are concerted operations, there are night expeditions, there are watchers at windows. The question for me is, Does this deplorable state of affairs disclose a cause of action at law? I find that it does not. A person may lawfully frighten the birds from his orchard, though he knows that as soon as they leave his own property they must enter upon his neighbour's: and similarly he is entitled to urge the wild snail with threats, entreaties or loud noises into his neighbour's garden. Mr. Bottle asked me to draw a

distinction between the persuasion or intimidation of a snail and the deliberate throwing of a snail; but that distinction is too fine for me. I must not be understood to say that defendant is entitled to pelt the plaintiff with snails; but trespass to property and trespass to the person are two different things, and in the absence of the latter I hold that the property-owner may dispose of his snails in what way he pleases. The action therefore must be dismissed. I am told that this decision will cause grave suspicion, unrest, and enmity in our towns and suburbs, but I cannot help that. It is the law.

(XI) REX *v.* BALDWIN, CHURCHILL, BRIDGMAN, AND OTHERS

The Sailor's Wife

THIS strange case, in which the accused are the principal members of the late Conservative Government, was concluded at the Old Bailey yesterday.

Mr. Justice Trout, addressing the jury, said: This painful but important case has revealed a singular story. The prisoners in the dock are indicted at the instance of a naval officer, Commander Paravane, upon two counts—first, that they did obtain a considerable sum of money by false pretences, and second, that they did, severally and collectively, libel the Commander.

Now, a number of the officers in His Majesty's Navy are married and have children; and, as you have heard, it is the principle or habit of the State to look with especial favour upon those who have taken upon themselves the responsibilities of matrimony and parenthood, since, for reasons not wholly clear to all of us, it is still considered desirable that the population of these already overcrowded islands should continually increase. Therefore the taxes exacted from a bachelor are

greater than those required of a married man; and the income-tax of a father is reduced, though not extensively, in exact proportion to his fertility. Pensions are granted to widows, but not to spinsters equally needing support. In addition, the officers and men of His Majesty's fighting forces receive higher pay (or allowances) from the day that they lead some happy girl to the altar—that is to say, the officers and men of the Army, the officers and men of the Royal Air Force, and the men (but not the officers) of the Royal Navy. The exception is a startling one. We should have been surprised to hear that a sailor of any degree had been debarred from this particular privilege, for it has been stated in evidence in this case that every nice girl forms an affection for a sailor, and, on the other hand, that seafaring men are unusually susceptible to the attractions of the opposite sex; while the common assertion that they have a wife in every port, economically considered, would seem to suggest that in this respect they are entitled to an even greater measure of consideration than others.

However that may be, we should certainly not have expected the single exception to so wide a rule to fall upon those gallant and highly-trained gentlemen who command and inspire the Senior Service.

The distinction made between the officers and men of that service would increase our astonishment, if that were possible. It does credit, no

doubt, to the heart of the nation, that we deny to the officer what we are willing to grant to the simple seaman, but it will not, I think, enhance our reputation for common sense. Is it to be understood that it is correct and desirable for an ordinary or able seaman to take a wife, but not for the captain of his ship? Are the children of the stoker satisfactory additions to the race, but not the offspring of an Admiral? Surely we are agreed that the blood and spirit of Nelson and Drake are not confined to the forecastle? 'Hearts', if I may be permitted to imitate a celebrated poem,

> Hearts just as hard to check
> Beat on the quarter-deck,

and the arguments which support the endowment of marriage in the one place cannot miraculously lose their substance in the other.

One of the naval witnesses, a bachelor, ventured to attack the principle itself; but it is too late, or perhaps too early, to do that. If it were accepted as a matter of policy that a reduction of the population is the first essential for a reduction of our difficulties, then we should be right, not merely to refuse assistance to those who contract matrimony, but to impose a tax or fine upon the producers of every child, increasing in severity with the size of the family. There is much in theory to be said for this; but what is material is that we do not say it. On the contrary, we

publicly bewail the smallest decline in our national birthrate, which is already lower than that of France, long derided by us as a decadent nation antagonistic to the birth of babies. We cling to the strange belief that it is possible and proper to squeeze into a suit-case of limited dimensions an unlimited number of objects; and hence, in our limited territory, we applaud and support the multiplication of infants. So long as that is our general line of thought any particular departure from it will be difficult to justify; and none perhaps could be more dubious than the one under discussion. Quality as well as quantity must be our aim; and if that be admitted it is clear that the breed of the naval officer is one of the first which an eugenical expert would be careful to include in any scientific plan for the improvement of the race.

These general observations have very little to do with the merits of this case; but when they are understood they make it more difficult to understand the conduct of the defendants; and, in any case, I like the sound of my own voice, and have no doubt that you enjoy it as much as I do.

Now, as might have been expected, the Silent Service have suffered almost in silence what appears to them to be an injustice to themselves and a danger to their country. But faint indications of unrest have from time to time reached the ears of our legislators; and in 1925 the defendants,

impressed, no doubt, by the arguments which you have just heard, asked Parliament to vote, that is, to supply and sanction the use of, a large sum of money—four hundred and thirty thousand pounds —for the express purpose of providing what are called marriage allowances for the officers of the Navy. The House of Commons, believing in the representations of the accused and eager to correct a wrong, nobly voted the money. We can imagine the quiet thankfulness, the sober celebrations with which that news was received in the far-flung ward-rooms of the Fleet. You have heard in evidence how those already married held up their heads and sent off little presents to their wives, as if the burden were already lightened; while those not married turned their fancy for the first time to thoughts of love, or dared at last to welcome into their hearts affections which they had feared to encourage before. We do not know how many hesitating lovers were emboldened by the defendants' promise to make the fatal promise themselves; how many have wives and families to-day who but for the defendants' act would still be single. But we know that they are numerous; and heavy must be the responsibility of him who by false undertakings entraps even one man into that lifelong entanglement which we call marriage.

Sailors are notoriously trustful; and we can picture the incredulous dismay which swept across the seas and stalked through the Royal ports

when, five months later, it was announced by the prisoner Baldwin that the golden dream was not to be fulfilled. Commander Paravane has told you that at the moment when he received the shocking information he was in the act of making an offer of marriage in writing. That marriage never took place. It may be that the Commander is more fortunate than some of the other victims, but he does not take that view.

Be that as it may, it is clear that the defendants did obtain a large sum of money on the strength of representations which they have not fulfilled. The somewhat feeble defence has been raised that the money was asked for, and obtained, 'provisionally' only; but this would have more force if there were any evidence that the money had been returned. On the other hand, you have heard that not long before the prisoner Baldwin's announcement a much larger sum of money was granted to persons interested in the coal-mines. That may well have been a worthy purpose; but a person who takes money intended for his mother and spends it upon his aunt will not be excused by the excellence of his aunt. The question is, Have the prisoners by their statements done injury to individuals? And I think they have.

Further, the Commander asks you to say that in some of the speeches, at first sight inoffensive, there is contained an innuendo to the effect that he (and his colleagues) are not fit persons to marry

and have children,[1] and in particular that they are inferior in this respect to the officers of the Army and the Air Force, and to the men under their own command. There is some evidence that this suggestion may be gaining ground; for, as you have heard, on the last occasion that this topic was discussed in the House of Commons it excited the interest of less than forty of the six hundred and fifteen members, so that the House was 'counted out', and the debate ignominiously concluded. This suggests that in the opinion of the Legislature it matters little whether a naval officer is able to marry and beget children or not; and it may be that the speeches of the prisoners, when coupled with their conduct, have encouraged that opinion. But all these questions, and many others, it is for you and not for me to answer.

The jury found all the prisoners guilty on the first count, and three of them on the second.

The Judge said he would take time to consider the sentences.

[1] In *Fox* v. *Commander Stanley* (2 K.B., 1904) it was *held* that to call a man a 'son-of-a-gun' was defamatory, and the father recovered damages, the implication being that modern tubular weapons were incapable of generation and therefore the plaintiff's son must be a bastard. But see *Dean Furley* v. *The Bishop of Winchester* (1910) where the accusation was made at a Diocesan Conference.

(XII) *IN RE* JOHN WALKER

What is Prohibition?

THE House of Lords to-day delivered judgment in the Rum Row appeal.

The Lord Chancellor said: My Lords, this appeal raises issues of profound gravity. In effect it is an action between the United States of America and His Majesty the King; and your decision must take account not only of municipal but international law and custom.

John Walker, a British citizen, was arrested at the instance of the United States representatives in this country, who demand that he be extradited on a charge of murdering an American citizen. Mr. Walker is a mariner and trader; and he has long been engaged in the export trade, which is by all authorities acknowledged as the foundation of the prosperity of these islands. On the night of January 15th last he was proceeding peacefully towards the coast of America in a small craft which carried a cargo of whisky, the produce of Scotland. Without warning or provocation the occupants of an American vessel opened fire on Mr. Walker; and he, judging that he had to do with pirates or sea-rovers, returned their fire. An

American citizen was killed. Mr. Walker returned safely to this country and we are now asked to surrender his body with a view to his trial and punishment by the American Courts.

It is a matter of dispute between the parties whether the conflict took place within the territorial waters of the United States or not. But, if my view of the case be correct, an affirmative answer to that question would not necessarily be decisive. It is true that we have agreed by a treaty of long standing to extradite, or deliver up —to use a more pleasing expression—all persons who, being charged with murder in American territory, shall seek asylum in our own. But it is necessary to consider the nature of the practice of extradition. It is in essence a courtesy, an act done in derogation of sovereignty for the mutual convenience of civilized nations. Now, we say in our Courts that he who asks for equitable treatment must himself do equity.[1] In the same way, among nations, a privilege founded on the usages of civilization cannot properly be demanded by a barbarous nation or for any purpose which runs counter to those usages. Slavery, for example, is an institution repellent to the consciences of all civilized nations, and if we were asked to deliver up to a foreign country a person claimed by that country as a slave we should without difficulty

[1] And see Bracton: '*Nemo nudus curiam appropinquare debet.*'

formulate a refusal, no matter what treaties appeared to bind us. Again, the country of Russia has adopted certain stringent laws against the practice of religion and the persons of its ministers, laws which in the judgment of civilized nations are barbarous and insupportable. I can imagine, my Lords, a Russian Bishop in flight from the operation of those laws. I can imagine a British seaman, true to the traditions of his race, harbouring the reverend fugitive in his vessel and conveying him to the sanctuary of these islands ; but I am unable, my Lords, to imagine the arguments which would prevail upon this honourable House to deliver up that mariner or that divine to the inhuman treatment of a Russian tribunal. If we were confronted with some old treaty we should reply that when that treaty was signed we did not contemplate that the other party to it was likely to sink into a condition of savagery, and that by that unfortunate relapse our obligations were extinguished.

Such is the nature of extradition. And now let us examine the grounds upon which we are invited to extradite our fellow-citizen.

The deceased American, it appears, was an officer of the Preventive or Revenue department, and his particular function was to prevent and punish the importation of spirituous liquor into the territory of the United States. The authority under which he was acting at the time of his death

was an enactment entitled the Eighteenth Amendment to the American Constitution, amplified and explained by the Volstead Act; and these laws are the embodiment of a policy called 'Prohibition', that is to say, the absolute prohibition of the importation, manufacture, sale, or consumption of what is strangely known as 'alchoholic liquor'.

My Lords, in my judgment that policy and those decrees are contrary to the concerted usage of civilized nations. There are certain rights, customs, liberties, and practices which have been accepted by the enlightened peoples of the world as necessary to the life of civilized men. There is the right to personal freedom—the opposite to which is slavery. There is the right to freedom of worship according to the conscience and belief of the individual—the opposite to which is religious persecution. There is the right of all men to the peaceful use of the seas—the opposite to which is piracy. And there is the right of free choice in such matters of personal behaviour, dress, and diet as do not affect the safety of the realm or the rights of other individuals—the opposite to which is Prohibition.

My Lords, those who are guilty of slavery, piracy, or religious persecution are regarded rightly as *hostes humanis generis*, outlaws of the world, persons who have violated the common laws of mankind. Such persons or peoples forfeit the

rights which are commonly attached to nationality or sovereignty and may be apprehended or punished by the first-comer. And in that shameful category I include without hesitation those who are guilty of the policy or practice called Prohibition. My Lords, the use of wine is as old as the use of religion; freedom of behaviour is now as highly prized as freedom of the person, and, though I would not positively give the same value to all these rights, from a negative aspect there is nothing which justifies the violation of one more than the violation of another. It is intolerable that at the present stage of civilization peaceful traders should be assailed with fire-arms on the high seas for no offence other than the conveying from place to place of the wine of their own country. And (though this consideration has no juridical significance) such conduct must be particularly offensive to the people of these islands, whose fortunes for many centuries have been bound up with the practice of navigation and the distribution of their merchandise along the coasts of the world. Yet it is a nation confessedly guilty of such conduct which now demands of us a privilege extended, as a rule, *ex gratia* only, and only to a trusted friend.

The learned counsel who appeared for the United States pressed upon us the ingenious argument that Prohibition was to be regarded as a 'moral experiment' and therefore deserved our

practical sympathy. This argument did not impress me. The evidence is that this 'moral experiment' has been in fact productive of more death, degradation, and civil dissension than any enactment of recent times.[1] Apart from that I must remind your Lordships that the laws of Russia, already mentioned, are also commended by the Government of Russia as a 'moral experiment'. Yet, as I have already said, we should do nothing to support them. The question is not, How do the laws of a given country appear to the Government of that country? but, How do they appear to the eyes of the civilized world? It is conceivable, my Lords, that the Government of Italy might restore the institution of slavery; but, though they declared this act to be a 'moral experiment', we should not on that account extend our approval or surrender our sovereign rights.

My Lords, I have no doubt that the Eighteenth Amendment is an offence against the customs of the civilized world, *jus gentium*. No other civilized nation has been or is guilty of this offence; and the nation guilty of it must be considered as an international outlaw. It may take effect within the coasts of America, but it cannot be acknowledged or condoned beyond them. It follows that individuals acting in pursuance of that enactment

[1] 'O Temperance! O Mores!' *Evidence of Mr. Albert Haddock before the Royal Commission on the Licensing Laws (1929–1937).*

have, as against the nationals of other countries, no rights; they have the status of pirates, cannibals, marauding savages; and they may be shot down or apprehended by the decent citizens of any civilized nation. *A fortiori*, no application based upon a supposed injury done to them can be entertained by our Courts. The appeal must be allowed and Mr. Walker must be set at liberty. This, my Lords, with some reluctance, presiding over the highest tribunal of our land, I declare to be the law.

Lord Mulberry said: I agree. But I arrive at the same conclusion by a simpler route. The evidence is clear that the deceased man was pursuing Mr. Walker, *animo furandi*, in order to take his cargo from him by force; I am satisfied that with that intention he opened fire on Mr. Walker outside the territorial waters of the United States, that is, on the high seas, and that he had frequently acted in this manner before. Now, all authorities agree that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The deceased, therefore, was in fact, and in law, a pirate; and the somewhat fanciful analogies of the Lord Chancellor are not required in order to bring him within that detestable category. Mr. Justice Lushington, in *The Magellan Pirates*, 1853 (1 Spinks's Eccl. and Adm. Rep., 81) said: '. . . all persons are held to be pirates who are found guilty of piratical acts, and piratical acts

are robbery and murder on the high seas. I do not believe that, even where human life was at stake, our courts of Common Law ever thought it necessary to extend their inquiry further if it was clearly proved against the accused that they had committed robbery and murder on the high seas. In that case they were adjudged to be pirates and suffered accordingly.' The Common Law is clear, and I know of no treaty or statute which can be held to have superseded it. Mr. Walker did what he did in self-defence against the assaults of a pirate, and he must be released.

Lord Lick, *Lord Arrowroot*, and *Lord Sheep* concurred.

NOTE.—See Philip Snowden's *Essays on Wine*: 'By what right do we call ourselves Free Traders if the goodliest of all commodities may not freely circulate?'; and Senator Honk: 'America's history began when we threw the tea into the water: it ended when we threw the wine.' See also A. Capone's *Handbook for Bootleggers*; and Mrs. Q. Fester: 'A generation is growing up which does not know what alcohol *is*' (*White Wings*).

(XIII) HUXLEY AND OTHERS *v.* PHIPPS, POTTS, SLAMMER & CO.

Sad Case of Mr. Justice Wool

THIS unusual libel action was brought to a close to-day before Mr. Justice Wool, whose hay-fever appears to be no better.

His Lordship, addressing the jury, said: Members of the jury—A-tishoo!—in this case the plaintiffs—A-tishoo! A-tish-*oo*! A-Tish-oo! Oh hell!—the plaintiffs are certain well-known English authors—Usher, get me that nasal spray—who are suing the defendants for damages for libel. The defendant firm are publishers, conducting their business in this country, and they have issued in this country a publication called *The Index Librorum Prohibitorum*, a list of prohibited works and authors. A-tish-oo! My hat! What are the doctors for? It is admitted that the inclusion of a book or author in this list conveys, and is intended to convey, that they have an immoral or irreligious tendency, and the plaintiffs, being authors who enjoy the respect and custom of vast numbers of the British people, object to being included in such a list.

Stupefied though the Court has been throughout

these proceedings by the ravages of an absurd but enfeebling disease, we at once put the question to counsel: By whom have these books been 'prohibited'? Who has judged them to be blasphemous or obscene? It was open to the defendants to plead justification and to show by evidence that what they have said or insinuated is true. A-tishoo! Drat! For example, if they had shown that these books have been condemned under Lord Campbell's Act by a British tribunal there would have been no more, or not very much, to be said. Or they could have exhibited the actual books to the Court and jury and by suitable extracts excited our horror and indignation. A-tishoo! If the third juror from the left laughs at my misfortune again I shall commit him. But what, in fact, have the defendants done?

They have not pleaded justification. They have not attempted to show that plaintiffs and their books may reasonably be described as blasphemous or morally corrupting. They have pleaded what is called 'privilege'. And a more astounding plea I never heard in my life. Usher, I think I will try that Noso stuff again; it seems to give some small relief.

This *Index* or list, the defendants tell us, was not compiled by any British official, cleric, or social worker, or indeed by any British subject. It was compiled by a Dag—by a foreigner, at the

instance of a religious body which has its headquarters in Italy. The members of that body are informed not only that the literary works mentioned are objectionable, but that it is a sin to read them. Strong language, you may think, but not excessive, perhaps, in view of the exceptional privileges which in almost every country the human race delights to give to its spiritual advisers. A-tish-oo! These privileges, however, are not unlimited, and can be abused; and where the subjects of one State attempt to restrict the liberty of action of the free-born subjects of another a new and disquieting set of questions may arise, as, for example, Is such a restriction, however worthy the motive which inspires it, compatible with modern ideas of sovereignty and democratic government? These delicate questions, happily, I am not called upon to answer. A-tishoo! The Court will not sit to-morrow. It is enough for me to say that had the defendants in this case been the responsible representatives of some recognized religious body having its roots in this country I should probably have ruled that this was a privileged occasion. It would be dangerous to lay down a general rule in more positive terms. The official religion of Russia, for example, is atheism; and it is conceivable that the Soviet authorities might issue an *Index Librorum Prohibitorum* for the guidance of the Soviet's devotees in this country; and that *Index* might declare to be

corrupting and harmful a theological work by the Archbishop of Canterbury, Hymns Ancient and Modern, or the prose reflections of the Dean of St. Paul's. But in any proceedings which arose no British Court, I think, would be prepared to say that that *Index* was a privileged publication. And some Court some day may have to decide whether and on what grounds we are willing to grant to Rome what we should certainly refuse to Russia. A-tishoo!

All these speculations, however, are, I repeat, irrelevant, and I hope that they weary you as much as they weary me. The defendants are not a religious body, foreign or British. They are a commercial firm, publishing books for gain. Their case, as I understand it, is that the *Index* was compiled originally under circumstances of privilege which excused the authors from the ordinary legal consequences of defamation, and that that privilege protects the defendants also. A-TISH-OO! A-TISH-OO! A preposterous—A-tishoo! 'A man,' said Lord Mildew in *Archdeacon Blakeney* v. *Starr-Wood*, 'does not become a clergyman by putting on a clergyman's hat.' 'Privilege', in the legal sense, is not transferable. It is attached to particular persons in particular situations. The privilege of a mistress entitles her to state to an inquirer that a servant cannot or will not make a good kidney omelette; nevertheless other people will not be protected if they go

about and broadcast that damaging information. Usher, bring me wine ; my ears tickle. The defendants are in the position of persons who have repeated or passed on a defamatory statement made by another ; and it is settled law that he who repeats a slander is as guilty as he who originates it.

Counsel for the defendants, whom I dislike intensely—A-tishoo !—insisted on dragging in the Pope, the argument being that the Pope is behind this *Index*, and that the authority of the Pope is so extensive that, like the umbrella of an Oriental potentate, it may give protection to lesser individuals. Now, who is the Pope ? He has not been called in evidence, nor has any representative appeared to speak for him. I understand that he is an alien, of considerable importance in his own country. But no alien, whatever his authority, can excuse a breach of the law by a British subject. The Pope, whoever he may be, is in the same position as would be an important member of the Government of Russia. A-tishoo ! We may, or may not, extend to him special privileges—the evidence does not disclose ; but, if so, they belong to the Pope *qua* (if I may say so) Pope, and cannot be shared with the ordinary citizen. In short—A-tishoo !—I find that the defendants have no defence : they have stated or insinuated that the plaintiffs are the authors of books improper to be read by the ordinary citizens of this country ; they have produced no positive evidence to support

these assertions: their only defence has fallen to the ground, and they must pay damages. I assess the damages at thirty thousand pounds. A-tishoo!

Sir Ethelred Rutt, K.C. (*for the defendants*): Milord, with great respect, milord, a jury has been sworn in this case, and, milord, with great submission, milord, I submit, milord, it was generally understood, milord—milord, I think I shall carry me learned friend with me—milord, it is not for us to call in question your lordship's conduct, but, milord, we rather thought you were addressing the jury, milord, preparatory, milord, to the finding of a verdict by the jury——

The Judge: The jury? A-tishoo! A-A-A—Oh, my detestable ancestors!—A-tishoo! What does the jury know about it?[1] A lot of smugs—A-TISH-OO!

Sir Ethelred: I beg your pardon, milord?

The Judge: I said a lot of smugs—ignorant smugs, self-satisfied smugs—and, by my mouldy trousers, I meant it! Think I'm going to sit here and sneeze all night? Verdict for the plaintiffs; damages, whatever I said; costs all round; the Court will not sit again this week. A-tishoo! O Jee-HOSH-aphat!

The Court adjourned.

[1] '*Nimia veritas in judice reprobatur*' (Bracton). But see the memoirs of the learned judge, recently published—*Fifty Years on the Bench* (Swansdown and Craik).

(XIV) REX *v.* SKELTON AND DEW

What are Stockbrokers?

THE trial of this case was concluded at the Guildhall to-day before Alderman Moody.

The Attorney-General, in his speech for the prosecution, said: This case, your worship, though it comes up for decision in a Court of Summary Jurisdiction only, raises issues of grave national importance. Otherwise, I need not say, I should not be appearing in person before a mere magistrate.

The Bench: Who are you?

Sir Antony Dewlap: I am the Attorney-General.

The Bench: Ah, yes, we have heard of you. Proceed.

Sir Antony: The prisoners in the dock, your worship, are charged with an offence against the Street Betting Act, 1906, by which 'any person frequenting or loitering in streets or public places, on behalf either of himself or any other person, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, will in the case of the first offence be liable on summary conviction to a fine not exceeding ten pounds and for a second offence a fine not exceeding twenty pounds.'

The prisoners are both members of the London

Stock Exchange, Mr. Skelton being a broker and Mr. Dew a jobber. A jobber is one who deals in a particular 'market' or class of securities; and Mr. Dew deals particularly in the American market. Now, the members of the London Stock Exchange have a large roofed building in which to transact their business; but such is their energy and zest that after that building is closed in the afternoon many of them continue to do business outside, in Throgmorton Street and the adjoining courts. It appears, your worship, that by long habit they have come almost to regard this thoroughfare as their corporate property; and I am told that, if a member of the general public ventures to loiter, as the stockbrokers loiter, on the pavement, remarks of an increasingly unfriendly nature are addressed to him, such as 'Where did you get that hat?' For these reasons, I understand, it will be argued by counsel for the defence that Throgmorton Street is not a 'street or public place' within the meaning of the Act. But as to that, your worship, I shall call evidence to show that the public have uninterrupted physical access to the street at either end, and that they do in fact make use of it. Indeed, it would be a strange thing if the long-continued arrogance of a few citizens could deprive the King's highway of its public character.

The Bench: Be brief, Sir Antony. We are not accustomed to perorations here.

Sir Antony: Your worship, the definition of a 'street or public place——'

The Bench: Do not go on about that. We are with you.

Sir Antony: I am obliged to your worship. Your worship, I need not say——

The Bench: Then do not say it.

Sir Antony: Your worship is very good.

The Bench: I am not very good. I am very dyspeptic.

Sir Antony: Perhaps your worship would care to try one of these infallible tablets? One or two, taken in a glass of water, your worship——

The Bench: Thank you. Usher, the tablets.

(His worship then took two tablets, and appeared to experience considerable relief.)

The Attorney-General, continuing, said: The facts, your worship, are as follows. On the 4th of this month, at about 4.30 in the afternoon, the prisoner Skelton approached the prisoner Dew in Throgmorton Street and invited him to quote a price for *Anglo-American Hot-water-bottles Deferred*. Dew replied $15\frac{1}{8}$–$16\frac{1}{2}$; and Skelton then agreed to buy from him a parcel of five thousand *Hot-water-bottles Deferred* at $16\frac{1}{2}$ in ten days' time. Your worship, that sounds a perfectly innocent transaction——

The Bench: Where do you get these tablets?

The Attorney-General: Spink's, your worship—Spink and Holiday, in Coventry Street. Now, it

appears that in recent weeks there has been a considerable decline in the market value of many American securities. Prices had fallen so low that on the date in question many people in this country supposed that their next movement must be an upward one. And it will not be denied that Mr. Skelton was agreeing to buy *Hot-water-bottles Deferred* at 16½ on the 14th in the hope and belief that in the interval the price would rise to 30, shall we say, and that he would then be able to sell them again at the higher figure, thus making a handsome profit. Mr. Dew, on the other hand, believed and hoped that prices would continue to fall, so that on the 14th he would be able to buy at 5 and sell to Mr. Skelton, as agreed, at 16½. Mr. Dew had in fact on the 4th no *Hot-water-bottles Deferred*, and Mr. Skelton did not in fact desire to possess any. Each party was speculating on the movements of the market; each was, as it were, 'backing his fancy', Mr. Skelton betting on a rise and Mr. Dew on a fall. In other words, it was a gambling transaction, a wagering contract, a——

The Bench: We see what you mean, Sir Antony.

Sir Antony: Your worship, there are many thousands of respectable and God-fearing citizens in this and other countries who devote every working day of their lives to transactions of this kind. In the United States, your worship, a very moral country, which has thrust out the use of

alcohol from the national life, the operations of such persons have recently caused widespread ruin, distress, and suicide, have shaken the financial and industrial fabric, and have even had disagreeable repercussions abroad. *Naturam expellas*, your worship——

The Bench: Who is he?

Sir Antony: Man will have his indulgences, your worship; and it may well be that the time and treasure and energy which were previously expended on the habit of alcohol have been transferred to the habit of speculation, in which case the extent of the net national gain is dubious. None of our public moralists, however, has yet upon these events made any of those severe pronouncements which the spectacle of our other indulgences so often extracts from them.

The Bench: What has all this to do with me?

Sir Antony: Your worship, the present Government has set its face against all manifestations of that vice which may be simply described as desiring something for nothing. For this reason the police are instructed energetically to enforce the laws against street-betting, a practice which above all forms of gambling is held to demoralize the poor. Any person suspected of loitering in public with intent to enable the poor to back their fancies on the race-course may be arrested without warrant;[1] and in fact such persons have been

[1] See Wedderburn on *Wagers* (pp. 1049–1162).

reduced to the condition of pariah dogs, slinking guiltily from corner to corner. But, your worship, between their proceedings and the proceedings of the prisoners there is no distinction in logic or morals, except that one is assisting the citizens to bet on race-horses with money which they possess and the other is assisting them to bet with money which they do not possess (in many cases) upon the prosperity and health of the nation's industries. The share-capital of industry is the life-blood of a country, the fount of employment, the guarantee of progress, the foster-mother of invention. No man should be able to gamble with the life-blood of his country and to endanger by speculation the stability of manufactures and the employment of the people. Yet, as I have said, many thousands of citizens are occupied in doing this and very little else, and, so far as I know, no Bishop has ever lifted up his voice against them. The confused and wavering mind of the Legislature, your worship——

The Bench: I beg your pardon ?

Sir Antony: The confused and wavering mind of the Legislature——

The Bench: What about it ?

Sir Antony: I was saying, your worship, when your attention wandered, that the confused and wavering mind of the Legislature had left many gaps in the laws against gambling. And so long as the prisoners conduct their operations under a

roof they would seem to be lawful; though there is some support for the view that an indictment would lie against the Stock Exchange for keeping a common betting-house. But it is without doubt unlawful for a man to back his fancy in the public street, whether that fancy be a race-horse or a hot-water-bottle deferred; and I ask for a conviction.

The Bench: Anything *you* say, Sir Antony. They are convicted.

Sir Antony: Your worship, that was in the nature of a test case. In the next case five hundred and seventy-three stockbrokers are charged with loitering with intent to commit the same offence.

The Bench: Can they all be convicted before lunch?

Sir Antony: I think not, your worship.

The Bench: Then we had better have lunch. Can you spare another tablet?

The Court adjourned.

(XV) REX *v.* LEATHER

Is Fox-Hunting Fun?

MR. JUSTICE PLUSH gave judgment to-day in the Harkaway Hunt case.

His Lordship said: These proceedings have been instituted by the Crown against the Master of the Harkaway Fox Hounds to secure a declaration that he is liable for Entertainment Duty. This tax is a singular product of our own times. Our fathers regarded the entertainment of the citizen as a lawful and desirable business, and the Roman emperors went so far as to provide free entertainment for the people, ranking this in importance next to the provision of bread. But the King-Emperor of our realm has in his wisdom seen fit not only to withhold all assistance from the purveyors of public entertainment, but to levy a heavy duty upon them. This tax is so heavy as to partake almost of the nature of a fine, only exceeded in severity by the duties on the sale of spirituous liquors, and there is reason to suppose that in the mind of the Crown the two things are coupled together as harmful practices deserving of discouragement.

The tax is not a tax upon profits but upon

gross receipts; and it has been proved in evidence before me that a theatre which is not attracting the public for the reason that it is presenting one of the plays of the national poet, Shakespeare, and is therefore making a weekly loss, will still be required to render a weekly payment to the Exchequer representing roughly twenty per cent of its takings. That is to say, the management may receive one hundred pounds from the public, pay eighteen pounds to the Crown, and retain nothing for themselves. It may be said that any one who presents a play by the national poet has only himself to blame; but it is certain that no other profession would cheerfully endure a tax of this character and severity. It is within the knowledge of the Court that the bookmakers of our land were recently required to pay a duty of only two per cent on their receipts; but so energetic was the objection of these valuable citizens to a tax which had no relation to profits that it was removed. The Entertainment Tax ranges from sixteen to nearly twenty per cent, varying with the prices charged for the entertainment. The impost is a strange one in an age which announces as its chief objective a general increase of leisure and recreation, and in so far as entertainment is founded upon literature and the arts the tax may be said to be a tax upon education and the mind.

These considerations have a relevance, which

may not immediately appear, to the question which the Court is called upon to answer: *Is fox-hunting an entertainment?*

The defendant, Lord Leather, is Master of the Harkaway Foxhounds, and he has in the box given us a clear and straightforward account of his proceedings, which I am prepared to accept as the truth. As I understand him, the country district in which he resides is subject to the ravages of a cruel and voracious quadruped of the genus *Vulpes alopex*, commonly known as fox. This creature is of a carnivorous habit and preys upon the poultry of the peasants and farmers, causing much distress of mind and monetary loss; it is cunning, swift, difficult to catch, and a prolific breeder. The defendant, therefore, a public-spirited man, has taken certain measures to rid the district of this pest and so to secure the livelihood of the poultry-keeper and the food-supply of the country. He has purchased a number of specially-selected dogs and has trained them to pursue the fox across country, guided only by their sense of smell, which is exceptional. He has also organized a band of ladies and gentlemen who, like himself, have the interests of British agriculture at heart and are willing to assist him at whatever personal risk. These helpers, loosely called the 'Hunt', are mounted on horses, and by their mobility and knowledge of woodcraft render invaluable aid in the intimidation, apprehension, and destruction of

the fox. Many of them, the defendant has told us, are willing to give up a day's work in the metropolis and make a special journey to the country in order to play a small part in one of his concerted operations against the common enemy. These operations are conducted three or four times in a week with tireless vigour all through the winter months; but even so it has been found impossible to exterminate the pest. It was not made quite clear to me why the defendant relaxes his efforts in the summer time, but I understand that once again he has been guided by his solicitude for the farmer, whose standing crops might suffer damage from the exertions of the defendant's dogs. The fact remains that during those months the fox is unmolested, as free to multiply his own species as he is to diminish that of the hen. Indeed, the witness Turmut, a farmer, some of whose irrelevant and noisy evidence I ought not perhaps to have admitted, maintained with some heat and no little ingratitude that the defendant and his helpers would do better to conduct their campaign against the fox with rifles and shot-guns both in winter and in summer. But I was assured by the defendant that for technical reasons this is wholly impracticable.

The procedure of a hunt, as I understand it, is as follows: The fox is alarmed and dislodged from its lair by the loud barking of the dogs and the playing of musical instruments. Should the quarry

escape into the open country, as, to the chagrin of the hunt, it commonly does, the dogs at once give chase, and the horsemen follow the dogs; other helpers follow in motor-cars along the nearest road, and many of the poor follow on foot. Now it is the case for the Crown that all these persons, although as practical men and women they genuinely desire to rid the neighbourhood of a destructive animal, find a keen enjoyment in the process of destruction for its own sake. No one has ventured to question the single-minded purpose of the defendant, but it is argued that what for him was a crusade has become for his helpers an enjoyable spectacle, excitement, gratification —in a word, an entertainment. The witness Turmut strongly supported this view; and he pointed out with some force that the number of the defendant's helpers is in fact far in excess of what is practically necessary or useful, and that it is still increasing. He went so far as to say that many of the helpers did more harm than good, but that portion of his evidence did not favourably impress me.

If the contention of the Crown be correct, there is here a development not without parallel in other departments of the national life. The Englishman never enjoys himself except for a noble purpose. He does not play cricket because it is a good game, but because it creates good citizens. He does not love motor-races for their own sake but for the

advantages they bring to the engineering firms of his country. And it is common knowledge that the devoted persons who conduct and regularly attend horse-races do not do so because they like it, but for the benefit of the breed of the English horse. But their operations have attracted many thousands of citizens who do not conceal that they visit horse-races for their own selfish pleasure. Accordingly the State imposes an Entertainment Tax upon their tickets of admission; and a member of the Jockey Club would not be excused on the ground that his purpose at Epsom was to watch and foster the English thoroughbred.

The relevance of my observations on theatres will now begin to appear. The defendant has admitted in evidence that he collects an annual tribute from his helpers, from farmers, and others, who habitually attend his operations and enjoy the spectacle of his dogs and horses at their pious labours. These contributions are necessary for the maintenance of the dogs and their keepers and for other purposes; and they are willingly given by the ladies and gentlemen of the Hunt in return for the pleasure or entertainment which the defendant has provided. The Crown say therefore that he is liable to pay Entertainment Duty on the sums so received, at the statutory rates, that is to say, two shillings on the first fifteen shillings and sixpence for every

five shillings or part of five shillings over fifteen shillings.

The defendant's answer is that the fox may be said to enjoy the hunt for its own sake—and even the dogs and horses—but that his human followers are actuated only by philanthropic motives, and that his takings are devoted to a philanthropic purpose, the destruction of vermin and the preservation of poultry, and should therefore be exempt under the Act. Unfortunately for him this plea is disposed of by the precedents of the racecourse and the theatre. There is a school of thought which still holds that the plays of Shakespeare have an educative and uplifting character; but even if that could be established it would not exempt the rash man who presented them from handing over nearly a fifth of his takings to the Exchequer. In my judgment the contention of the Crown has substance. I hold that fox-hunting is an entertainment; that the moneys received by the defendant from the hunters and farmers are by way of payment for that entertainment, and that it must, like other entertainments, make its proper contribution to the public revenues according to law. Lord Leather is, as it were, the manager of a theatre: the Hunt are his audience and the dogs his actors. If, after remunerating his actors and paying the duty, he is out of pocket, it cannot be helped. It is a dangerous thing to give pleasure to the people. He has been Master

for sixteen years, and he must pay duty not only in respect of the current year but for every preceding year since the institution of the duty by the Act of 1916.[1] It has been urged before me that this will be a hardship; but, as Lord Mildew said in *Mope* v. *The Llandudno Sewage Commissioners*, '*Nullum tempus occurrit regi*'—or, 'Time is no object to a Government Department.' Costs to the Crown, *pari passu*.

[1] Cf. *Rex* v. *Churchill, Snowden, and Others* (1930), in which the defendants were *held* liable to pay 15/- *per annum* (Male Servant Licence Duty) in respect of their male private secretaries, and were ordered to make good the arrears for the 15 years preceding the summons. 'If a private secretary,' said Mr. Justice Wool, 'is not a "personal servant", who is?'

(XVI) BOARD OF INLAND REVENUE *v.* HADDOCK; REX. *v.* HADDOCK

What is a Cheque?

'WAS the cow crossed?'

'No, your worship, it was an open cow.'

These and similar passages provoked laughter at Bow Street to-day when the Negotiable Cow case was concluded.

Sir Joshua Hoot, K.C., appearing for the Public Prosecutor, said: Your worship, these summonses, by leave of the Court, are being heard together, an unusual but convenient arrangement.

The defendant, Mr. Albert Haddock, has for many months, in spite of earnest endeavours on both sides, been unable to establish harmonious relations between himself and the Collector of Taxes. The Collector maintains that Mr. Haddock should make over a large part of his earnings to the Government. Mr. Haddock replies that the proportion demanded is excessive, in view of the inadequate services or consideration which he himself has received from that Government. After an exchange of endearing letters, telephone calls, and even cheques, the sum demanded was reduced to fifty-seven pounds;

and about this sum the exchange of opinions continued.

On the 31st of May the Collector was diverted from his respectable labours by the apparition of a noisy crowd outside his windows. The crowd, your worship, had been attracted by Mr. Haddock, who was leading a large white cow of malevolent aspect. On the back and sides of the cow were clearly stencilled in red ink the following words:

'*To the London and Literary Bank, Ltd.*

'Pay the Collector of Taxes, who is no gentleman, or Order, the sum of fifty-seven pounds (and may he rot!).

'£57/0/0

'ALBERT HADDOCK'

Mr. Haddock conducted the cow into the Collector's office, tendered it to the Collector in payment of income-tax and demanded a receipt.

The Stipendiary: Did the cow bear the statutory stamp?

Sir Joshua: Yes, your worship, a twopenny stamp was affixed to the dexter horn. The Collector declined to accept the cow, objecting that it would be difficult or even impossible to pay the cow into his bank. Mr. Haddock, throughout the interview, maintained the friendliest demeanour;[1] and he now pointed out that the Collector could endorse the cow to any third party

[1] '*Mars est celare martem*': Selden, *Mare Clausum*, lib. 1, c. 21.

to whom he owed money, adding that there must be many persons in that position. The Collector then endeavoured to endorse the cheque——

The Stipendiary: Where?

Sir Joshua: On the back of the cheque, your worship, that is to say, on the abdomen of the cow. The cow, however, appeared to resent endorsement and adopted a menacing posture. The Collector, abandoning the attempt, declined finally to take the cheque. Mr. Haddock led the cow away and was arrested in Trafalgar Square for causing an obstruction. He has also been summoned by the Board of Inland Revenue for non-payment of income-tax.

Mr. Haddock, in the witness-box, said that he had tendered a cheque in payment of income-tax, and if the Commissioners did not like his cheque they could do the other thing. A cheque was only an order to a bank to pay money to the person in possession of the cheque or a person named on the cheque. There was nothing in statute or customary law to say that that order must be written on a piece of paper of specified dimensions. A cheque, it was well known, could be written on a piece of notepaper. He himself had drawn cheques on the backs of menus, on napkins, on handkerchiefs, on the labels of wine-bottles; all these cheques had been duly honoured by his bank and passed through the Bankers' Clearing House. He could see no distinction in law between a cheque written

on a napkin and a cheque written on a cow. The essence of each document was a written order to pay money, made in the customary form and in accordance with statutory requirements as to stamps, etc. A cheque was admittedly not legal tender in the sense that it could not lawfully be refused; but it was accepted by custom as a legitimate form of payment. There were funds in his bank sufficient to meet the cow; the Commissioners might not like the cow, but, the cow having been tendered, they were estopped from charging him with failure to pay. (Mr. Haddock here cited *Spowers* v. *The Strand Magazine*, *Lucas* v. *Finck*, and *Vere Bros.* v. *The Metropolitan Water Board*.)

As to the action of the police, Mr. Haddock said it was a nice thing if in the heart of the commercial capital of the world a man could not convey a negotiable instrument down the street without being arrested. He had instituted proceedings against Constable Boot for false imprisonment.

Cross-examined as to motive, witness said that he had no cheque-forms available and, being anxious to meet his obligations promptly, had made use of the only material to hand. Later he admitted that there might have been present in his mind a desire to make the Collector of Taxes ridiculous. But why not? There was no law against deriding the income-tax.[1]

[1] Cf. *Magna Carta*: '*Jus ridendi nulli negabimus.*'

The Stipendiary, after the hearing of further evidence, said: This case has at least brought to the notice of the Court a citizen who is unusual both in his clarity of mind and integrity of behaviour. No thinking man can regard those parts of the Finance Acts which govern the income-tax with anything but contempt. There may be something to be said—not much—for taking from those who have inherited wealth a certain proportion of that wealth for the service of the State and the benefit of the poor and needy; and those who by their own ability, brains, industry, and exertion have earned money may reasonably be invited to surrender a small portion of it towards the maintenance of those public services by which they benefit, to wit, the Police, the Navy, the Army, the public sewers, and so forth. But to compel such individuals to bestow a large part of their earnings upon other individuals, whether by way of pensions, unemployment grants, or education allowances, is manifestly barbarous and indefensible. Yet this is the law. The original and only official basis of taxation was that individual citizens, in return for their money, received collectively some services from the State, the defence of their property and person, the care of their health or the education of their children. All that has now gone. Citizen A, who has earned money, is commanded simply to give it to Citizens B, C, and D, who have not, and by

force of habit this has come to be regarded as a normal and proper proceeding, whatever the comparative industry or merits of Citizens A, B, C, and D. To be alive has become a virtue, and the mere capacity to inflate the lungs entitles Citizen B to a substantial share in the laborious earnings of Citizen A. The defendant, Mr. Haddock, repels and resents this doctrine, but, since it has received the sanction of Parliament, he unwillingly complies with it. Hampered by practical difficulties, he took the first steps he could to discharge his legal obligations to the State. Paper was not available, so he employed instead a favourite cow. Now, there can be nothing obscene, offensive, or derogatory in the presentation of a cow by one man to another. Indeed, in certain parts of our Empire the cow is venerated as a sacred animal. Payment in kind is the oldest form of payment, and payment in kind more often than not meant payment in cattle. Indeed, during the Saxon period, Mr. Haddock tells us, cattle were described as *viva pecunia*, or ' living money ', from their being received as payment on most occasions, at certain regulated prices.[1] So that, whether the cheque was valid or not, it was impossible to doubt the validity of the cow ; and whatever the Collector's distrust of the former it was at least his duty to accept the latter

[1] Mandeville uses *Catele* for ' price '. (Wharton's Law Lexicon.)

and credit Mr. Haddock's account with its value. But, as Mr. Haddock protested in his able argument, an order to pay is an order to pay, whether it is made on the back of an envelope or the back of a cow. The evidence of the Bank is that Mr. Haddock's account was in funds. From every point of view, therefore, the Collector of Taxes did wrong, by custom if not by law, in refusing to take the proffered animal, and the summons issued at his instance will be adjourned *sine die*.

As for the second charge, I hold again that Constable Boot did wrong. It cannot be unlawful to conduct a cow through the London streets. The horse, at the present time a much less useful animal, constantly appears in those streets without protest, and the motor-car, more unnatural and unattractive still, is more numerous than either animal. Much less can the cow be regarded as an improper or unlawful companion when it is invested (as I have shown) with all the dignity of a bill of exchange.

If people choose to congregate in one place upon the apparition of Mr. Haddock with a promissory cow, then Constable Boot should arrest the people, not Mr. Haddock. Possibly, if Mr. Haddock had paraded Cockspur Street with a paper cheque for one million pounds made payable to Bearer, the crowd would have been as great, but that is not to say that Mr. Haddock would have broken the law. In my judgment Mr. Haddock has behaved

throughout in the manner of a perfect knight, citizen, and taxpayer. The charge brought by the Crown is dismissed; and I hope with all my heart that in his action against Constable Boot Mr. Haddock will be successful. What is the next case, please?

(XVII) REX *v.* LOW

What are Politicians?

(Before Mr. Justice Wool)

AT the Old Bailey to-day the well-known cartoonist, Low, surrendered to his bail on a charge of criminal libel.

Certain comments of Mr. Justice Wool increased the anxiety which is felt for the health of this venerable and popular judge.

Sir Ethelred Rutt, K.C., for the prosecution, said: The prisoner in the dock is indicted for libel, for that he did compose and publish in the *Evening Standard* certain defamatory libels concerning certain well-known statesmen and politicians——

The Judge: What is the difference?

Sir Ethelred: Milord, by statesmen I mean the leaders of my political party, and by politicians I mean the leaders of yours. (*Laughter.*)

Milord, Members of the Jury, the story is a sad one. If there is one rule of conduct on which all creeds and classes are agreed it is that we should all of us in this mortal sphere make the best use we can of those natural gifts with which we have been endowed by Nature,

by Providence, by the Public Schools and Universities, or by places of education. The prisoner has been endowed with a certain aptitude for draughtsmanship. And the jury will agree with me that that is a gift which all of us might envy—the gift of representing or recording in permanent form the beauty which we see about us—beauty, alas, which is so often fugitive and evanescent, the flowers which fade, the butterfly which to-morrow will be no more, and the sunset which will never be quite the same again. And though we were unable to rise to these heights we should all of us be glad if we could represent on paper the dignity and beauty of the human form and that nobility of mind which is often visible in the outward countenance of a man.

The prisoner in the dock has not thought fit to utilize his undeniable gifts in that way. He has chosen rather to hold up his fellow-men to ridicule and contempt; he has represented not the dignity and beauty of the human form, but its incongruous and awkward aspects; he has picked out for illustration not the noble actions of men, the self-sacrifices, the renunciations, the splendid successes, but their weaknesses and their vanities; not the distinguished aspirations of the soul but the unimportant peculiarities of the body.

But that is not all. You may think that such a course of conduct, such a lifetime of depreciation would be pitiful enough if the objects of this man's

attacks were private citizens on whose reputations no great matter depends. But what will you think when you hear, as you will hear in evidence, that all his working life this man has taken as the particular targets of his art the highest statesmen in the land, men who are charged, or have been charged, or hope to be charged with the government of our country and the care of her destinies?

Let me take one or two deplorable examples. Some of the jury may be familiar with the name of Viscount Brentford.

The Judge: Who is he?

Sir Ethelred: Better known, milord, as Sir William Joynson-Hicks, he was for many years Home Secretary in the late Conservative Administration. There was then a General Election, which the Conservatives lost. Sir William was rewarded for his services with a peerage, and——

The Judge: When I was at the Bar there was a solicitor called Hicks——

Sir Ethelred: The same, I believe, milord——

The Judge: Do you mean to say they made him a peer?

Sir Ethelred: Yes, milord.

The Judge: Good God!—Go on, Sir Ethelred.

Sir Ethelred: Milord, you know what is said about a man who raises his hand to strike a woman; and personally I place in the same category of shame the man who would raise a laugh at the expense of Viscount Brentford. That

pious statesman will be remembered as long as he is remembered for his efforts to make the people good, to preserve them from the perils of dancing, mixed bathing, late hours, and naughty books. Yet how has the prisoner habitually represented him? He has represented him in the likeness of a chimpanzee—I beg your Lordship's pardon?

The Judge (*chuckling*): I was only thinking. Go on.

Sir Ethelred: And he has given to that chimpanzee the soul of a man who revels in interference and is anxious to cut down the simple pleasures of the people. Further, in at least one notorious cartoon not only is the Viscount represented as a chimpanzee, but his wife and family appear as chimpanzees as well. Exhibit A, milord: 'The Jix Family Go Into Committee!' You will observe, milord, that the older the members of the alleged family the more like chimpanzees they become; the innuendo being, milord, that Viscount Brentford will eventually resemble the aged figure on the left of the picture. Milord, I am instructed that there is no foundation for these suggestions. Never, milord, in any shape or form has there been anything of that sort in the Hicks family.

Then let me pass to the three living statesmen who have filled the honourable office of Prime Minister of Great Britain. In the prisoner's drawings the face of the Right Hon. Stanley Baldwin wears an expression, I think invariably,

of bovine—I might almost say ovine—stupidity, an expression which suggests to any fair-minded man a constitutional reluctance for vigorous action and a congenital incapacity for continuous or ordered thought; Mr. Lloyd George wears the expression of a mischievous rodent, and Mr. Ramsay MacDonald an expression of sanctimonious self-satisfaction, for which again, I am instructed, milord, there is no foundation in fact.

The Judge: Where did he get the Joynson?

Sir Ethelred: I beg your Lordship's pardon?

The Judge: Never mind.

Sir Ethelred: The Lord Privy Seal, the Right Hon. J. H. Thomas, one of the leaders of a great trade union, the Minister who has particular charge of the Unemployment problem, is represented consistently in the costume of a Cambridge undergraduate on Boat-race Night; he appears to be intoxicated; his top-hat is crushed, his evening-dress is ill-fitting and disordered. And the jury will have to ask themselves: What impression is likely to be made upon the mind of an unemployed labourer when he sees the Minister responsible for finding him employment portrayed in such a guise and such a condition?

It may be urged in the prisoner's defence that he has done no more than to select some salient feature of each of his victims and give it an exaggerated emphasis for the purpose of identification. But in that case, the jury may ask,

Why does he not emphasize the English virtues for which Mr. Baldwin is famous, the unselfish patriotism of Mr. Lloyd George, the courage of Mr. Thomas, and that strong strain of idealism and self-effacement which has made Mr. MacDonald what he is?

He has not chosen to do that. Milord, what are in fact the features of our statesmen on which this man lays emphasis? They are, in the first place, those physical peculiarities which not even statesmen can avoid; and in the second, those human foibles and weaknesses which most of us would prefer to keep secret. If a man has long hair, a long face, or a long nose, those features become longer in every cartoon in which the victim figures. If he is known to have a fondness for pipes, for cigars, for evening-dress, he is represented as indulging those appetites on every occasion, suitable or unsuitable.

The Judge: Usher, bring me a *Who's Who.*

Sir Ethelred: Now, milord, as you may be aware, there is a base sort of person who are called, or call themselves, humorists, satirists, wits, and so forth, who make it their practice, not by drawing but by writing, to hold up their fellow-men to mockery and contempt, for the purpose of causing laughter. But even these low fellows acknowledge the limitations of good taste and decorum. What would be said, milord, if a humorous writer were to write, week after week,

'Mr. Maxton wants a hair-cut,' 'Mr. Baldwin has a stupid face,' 'Viscount Brentford looks like a chimpanzee,' or 'Lord Birkenhead is addicted to cigars'? It would be said first of all that that writer was singularly lacking in invention, and, secondly, that he had offended the canons of good taste, and, thirdly, that he was exposing himself to proceedings for libel.

The Judge: 'First viscount.' Extraordinary!

Sir Ethelred: But the man in that dock, milord, has been so conducting himself for many years, so far with impunity. Even a politician will turn, and that rare manœuvre has at last occurred. The prisoner has taken away the reputations of our statesmen, and it is the law that no man shall wrongfully take away the reputation of another. It is also, of course, the law that you cannot be held guilty of taking away a man's reputation if he has no reputation; and one of the questions for you to answer will be: Have the politicians any reputations to take away? Or, rather, had they before the prisoner began on them?

His Lordship will no doubt at a later stage explain the law to you in greater detail, but for the present I may be permitted briefly to tell you that in these criminal proceedings, if the prisoner is to be acquitted, he will have to satisfy you not only that the accusations which he has made are true, but that it is in the public interest that they should be published. And that raises a difficult question.

The Judge: 'Home Secretary.' Amazing!

Sir Ethelred: Is it desirable, Members of the Jury, that we should know the truth about our politicians and statesmen? Once a man becomes a statesman it seems that nothing can remove him from that position—no effort of ours and no error of his. You and I, in our humble walks of life, are aware that if we make too many mistakes our business will suffer, and we may even lose our employment. But a statesman may make mistakes, sometimes the same mistakes, for twenty years and still retain his office and our affections. And if we are to have them with us for ever, you may think that it would be better for us to remain in blissful ignorance of their real characters. Suppose that many of them are greedy for power, avaricious or insincere; suppose, for example, that it were the case that Mr. Baldwin had an unusually stupid and unimaginative face, that the main political purpose of Mr. Lloyd George was mischief, and that the Lord Privy Seal had an incongruous appearance in evening-dress, is it in the public interest that these facts (if they are facts) should be blazoned abroad week after week in the public Press? Must not this constant depreciation of those who have the conduct of the nation's affairs tend to undermine public confidence not only in the integrity and capacity of individual statesmen, but in the electoral system by which they were

elevated to office, and hence in our Parliamentary institutions and the whole principle of Democracy itself? I ask the jury to say that this man is a menace to the British Constitution.

In conclusion I will ask you to remember that our statesmen and politicians have wives and families, little children and mothers. They have hearts and feelings and nerves like other men. Figure to yourselves the anxiety, the pain that would be caused in your own households if every time you opened a certain newspaper you might expect to see the breadwinner held up as a public butt, the beloved features distorted, the little mannerisms exaggerated into vices. Ask yourselves, members of the jury, how would you like to see *your* daddy represented in the newspaper in the likeness of a chimpanzee?

Lord Brentford was then sworn.

The Judge: Hullo, Hicks! So you're a viscount now?

Lord Brentford: Yes, my lord. Your Lordship is amused?

The Judge (*laughing heartily*): No, no. I was only thinking. I beg your pardon.

Lord Brentford, giving evidence, said that he was not a chimpanzee. The principal note of his character was goodness. He did not think this had been fairly brought out by prisoner. But in these days it was better to be insulted than ignored.

Mr. Baldwin said that he was not a very stupid man.

Mr. J. H. Thomas said that he seldom wore full evening-dress, but that when he did he looked nice.

Lord Birkenhead said that it was a new constitutional doctrine to him that a statesman who from time to time enjoyed the solace of a cigar after the exacting labours of the day was thereby disqualified from holding high office under the Crown and disentitled to the common reticence enjoyed by the private citizen in relation to his own affairs.

The prisoner, in his defence, said that he emphasized physical features, not for the purposes of mockery or malice, but as symbols to express outstanding qualities of the soul. Lord Brentford's nose, for example, represented moral integrity and devotion to duty; the Lord Privy Seal's dishevelled dress-suit represented a dislike for out-of-date ceremony and a strong sense of realism in politics; Lord Birkenhead's cigar represented a profound interest in Oriental problems; Mr. Baldwin's pipe and expression denoted loyalty, generosity, fairness, humility, forgiveness, and patriotism, combined with charity, literary taste, and freedom from material ambition.

The case was adjourned.

(XVIII) REX *v.* SMITH, BROWN, JONES, ROBINSON, AND OTHERS

Sauce for the Gander

A NUMBER of well-dressed people were present in the dock to-day at Bow Street, charged with offences under the Motor-Car Acts.

The Stipendiary said: This is a clear case. The prisoners have been summoned at the instance of a Mr. Haddock for obstructing the highway. Mr. Haddock has given his evidence clearly, in a tenor voice of exceptional sweetness and tone. He tells us that on the 15th of this month, at about 6 p.m., he was attempting to cross the Victoria Embankment on foot, being on his way to his place of duty in Fleet Street. His evidence is that for about five minutes he was unable to do so by reason of a constant stream—or rather two constant streams—of automobiles proceeding at high speed along the highway. He made several cautious attempts to cross, but in every case was driven back in some alarm to the pavement or the island-refuge. No driver, he tells us, reduced speed at the sight of him; a few only appeared to observe his anxiety to cross, and their response was to intimidate him with raucous sounds produced by some mechanical

instrument. Wearying at last of this, Mr. Haddock beguiled the time by noting in a book the numbers of thirty-seven of the motor-cars which passed him. And the owners or drivers of those thirty-seven motor-cars stand in the dock at this moment.

Now the law is clear. Any man or woman who obstructs or impedes the lawful use of the highway by other citizens commits an offence and may be punished. Mr. Haddock, he tells us, is a member, indeed a Vice-President, of the Pedestrians' Association, and if he and his fellow-members were to congregate on the highway so as to interrupt the free passage of motor-cars for as much as two minutes they would without doubt be prosecuted and punished. The same law applies to motor-cars left stationary on the high-road without good cause or excuse; and in principle I can perceive no distinction between motor-cars which are stationary and motor-cars which are in motion. A motor-car proceeding fast may be less obstructive to a motor-car behind than if it were proceeding slowly; or it may be more, that is, if the motor-car behind it is attempting to pass it. But it seems to be mathematically obvious that, in relation to a pedestrian who wishes to cross the road, the faster a motor-car proceeds the more obstructive it is; for every additional unit of speed reduces by so much both the area and the period of safety for the pedestrian. A motor-car

going fast occupies more space, not less, than a motor-car going slow.[1] And if any one is disposed to contradict this assertion let him imagine a motor-car proceeding along the highway at an infinite speed, in which case it would be impossible for a pedestrian to cross the road at all.

Theory, however, though interesting, is here unimportant. Obstruction in every case must be a question of fact. In this case there is no doubt that Mr. Haddock was obstructed and delayed for a period of about four minutes. It ought to be possible for any free citizen to cross the high-road in less than that time; and those who for any private end prevent him are punishable. There seems to be present in the minds of some of the defendants an idea that they have rights on the high-road prior or superior to those of Mr. Haddock. The idea, of course, is contrary to history, to social justice, and to the Constitution;[2] and, when challenged, the defendants energetically denied that they had ever entertained it. But the fact remains that whenever the question arises on the high-road: Shall A, the walker, or B, the motor-driver, pause in his progress or deviate from his course in order to avoid a collision? the assumption is invariably made by B that it must, or will, be A who pauses, deviates, or stops. And the

[1] See Wedderburn on *Weights and Measures* (Appendix A).

[2] '*Qui prior est tempore potior est jure.*' But see *Wyndham Lewis* v. *Lane-Norcott* (1929, 2 A.C.).

defendants in cross-examination admitted that this assumption was operative in their minds when they saw Mr. Haddock hovering anxiously in the gutter; which is tantamount to saying that they have a better right to occupy the road than Mr. Haddock. For what reason? Because they are in control of vehicles possessing great mobility and power and Mr. Haddock is not. But what is the proper conclusion from that? That they are better able to keep out of the way, and therefore, so far from having greater rights, they have greater responsibilities.

The rule of the road at sea—if I may illuminate the subject with a rather sparkling digression—the rule of the road at sea provides a striking and instructive parallel. It is the rule at sea that a steam-vessel shall, at her peril, keep out of the way of weaker vessels—that is to say, of sailing-ships or oared boats. The principle of that is the principle already adumbrated: that the steamer, having the greater power, able to proceed easily at will in any desired direction, is the better equipped for the avoidance of collisions. The greater the power the greater the duty; not, as the defendants seem to say, the greater the power the greater the rights. The steam-vessel is not too proud to alter her course or reduce her speed in order to avoid a sailing-vessel. Nor are those sailing-vessels which are run down by steamers described as 'jay-sailors' or recorded contemptuously

as having been sunk through 'carelessly crossing the ocean'. The sailing-vessel, like the walker, may be almost obsolete, but she retains her rights; she ventures confidently across the seas and is not compelled to cower in port because of the increasing speed and power of the steamer.

These just principles and values, consistently maintained, would diminish the risk of collisions on land as they do by water.[1] In this case there was no collision; but no one but Mr. Haddock has to be thanked for that. Had he insisted upon his undoubted right to cross the road within a reasonable time of his first signalling his desire to do so there might have been a fatal accident; there must have been a distressing controversy. Mr. Haddock, a public-spirited man, forbore to insist upon his rights on the spot, but has wisely and patriotically invited the Court to insist upon them now. And this most readily we do. Mr. Haddock has as good a right to go about the town without undue impediment as the defendants;

[1] Cf. Bracton: '*In via non velocitas sed vita valet.*' And see Wool, J., in *Archdeacon Rogers* v. *Lightning Motor Coach Co.*: 'What is the *point* of all this *speed*? Is any one a penny the better? Are we wiser, more efficient, are we even more *punctual*? Gosh, no! We start later and we arrive later. A-tishoo! When I see these young fools dashing about—— A-tishoo! *Drunk* with speed, Sir Ethelred! A boy of seventeen may not buy a glass of beer; but he may drive a motor-car at seventy miles an hour. Nothing said till he kills somebody, and not much then. *What* a country! Usher, stand by—I am going to sneeze again.' (*Gresham Law Reports*, 1929, p. 341).

his appointments, and his peace of mind, are as important as theirs—in the present instance more so; for Mr. Haddock was on his way to work and the defendants, most of them, were on their way to pleasure. So that, if there were any question of priority, Mr. Haddock would have the advantage. But there is no such question. The prosecutor relies solely upon the common rights of reasonable mobility upon the King's highway. A man does not, when he acquires a pistol or gun, acquire the right to menace or retard the movements of his fellow-citizens; neither does he acquire that right when he acquires a powerful motor-car. Yet, so far as I can understand the defendants' case, they maintain that he does, and that the plaintiff has no just cause of complaint against a motor-car until it kills him.[1]

One of them advanced the singular defence that if Mr. Haddock had run very fast he could have crossed the road in safety sooner. But there is no law requiring the pedestrian to *run* across the King's highway. Indeed, there are many citizens who through age or infirmity are unable to run. They have a right not merely to life but to convenience, dignity, and peace of mind; and the defendants have a duty not only not to kill them but not to chivvy them across the road as if they were heads of cattle or poultry. The dignity of the human race must not be made subordinate to

[1] Cf. Hale's Maxims: '*Viventi non fit injuria.*

any machine. The time may come when pedestrians will be compelled by law to tunnel under the roads, build bridges over the roads, or be fired across by means of rockets. But so long as they share the roads in common with the defendants, the defendants must so conduct themselves that the careful citizen is able to walk across the common highway at a reasonable pace, without alarm or inconvenience. They have not done so. They have obstructed and hindered Mr. Haddock's use of the highway. They must be fined, imprisoned, and executed.

NOTE.—The above case is of academic interest only since the passing of the Criminal Law Amendment (Pedestrians) Act, 1930, by which pedestrians are forbidden to cross the roads except at certain fixed hours, *unless* a herd of not less than 50 shall collect at a given point, when, after the firing of a gun, they may be hustled across by policemen and dogs. Walkers are to carry licences.

(XIX) URBAN DISTRICT COUNCIL OF BURBLETON *v.* HADDOCK

The Freedom of the Shores

THE House of Lords delivered considered judgments in this appeal to-day.

The Lord Chancellor said: Not long ago I gave notice, as the head of the judiciary, that I was not satisfied with the state of the Common Law.[1] I announced that I was not prepared in every case to follow obsequiously the decisions of the past, however impressive their authority, and that I proposed increasingly to prefer the common sense of the twentieth century to the Common Law of the nineteenth. The present appeal is a welcome opportunity to put that promise into effect.

The appellant, Mr. Albert Haddock, was prosecuted by the Town Council of Burbleton for various offences against the by-laws of that smug and unlovely township. There were four charges against him: (1) That he did swim in the sea on Sunday within the hours prohibited by the Council; (2) That he did 'macintosh-bathe', as the strange

[1] See *Sparrow* v. *Pipp*—page 57.

phrase is—a practice forbidden by the Council ; [1] (3) That he failed or refused to pay to the Council's servants the sum of eightpence for the privilege of swimming in the sea ; and (4) That he failed to wear a swimming costume of the type, colour, and size approved and prescribed by the Council.

Mr. Haddock was convicted on all these charges at the Petty Sessions. He appealed. He appealed again. And, at length, after legal vicissitudes too numerous to recount, he has arrived, a suppliant, at your Lordships' honourable House.

It is not contended that Mr. Haddock has annoyed or injured any individual, nor has he offended against decency. His offence may be best described, perhaps, as *lèse municipalité* : he has entered the ocean at a time and in a manner convenient to himself, and in so doing he has wounded the dignity of a local authority persuaded erroneously that it has absolute power over the lives and conduct of all persons who venture within its jurisdiction.

Now, the Council relies upon the powers given to local authorities by the Public Health Acts Amendment Act, 1907, to make rules and regulations for

[1] It is not clear what this means. Was the appellant *swimming* in a macintosh ? And, if so, what was the objection of the Council on the score of decency ? A later observation by the Lord Chancellor suggests that the practice was to wear a macintosh over a swimming-suit and to deposit the former on the foreshore before entering the water. But, again, at this date it is difficult to see in what category of crimes or offences the practice was included.—Ed.

the conduct of sea-bathing. It is very desirable and proper that the Council should be able to supply or regulate the supply of bathing-huts, tents, life-belts and diving-boards, indicate the presence of dangerous currents or aquatic monsters, and do all such things for the convenience and safety of the bather as private enterprise has failed to do or is doing upon extortionate terms. And that, no doubt, was the intention of Parliament. The local authority is the servant of the citizen, and such powers are given to it in order to increase its capacity for service; but too many authorities appear to regard themselves too little as servants and too much as masters. It is one thing for the Council to say to Mr. Haddock, 'You wish to swim in the sea—we will provide you with facilities, as we are empowered to do.' It is quite another thing to say to him, 'You wish to swim in the sea —we forbid you to swim in the sea except at such times and places as we prescribe, upon certain moral or religious principles with which you may or may not agree.' But this is what in fact the Council have said. Let us see by what authority they say it.

Now, no one will deny that their jurisdiction extends at least as far as high-water mark, where the land proper comes to an end. But the alleged offences were committed at low-water on the foreshore, that is, in the area between high-water mark and low-water mark. And what authority

has the Council there? The foreshore is vested in the Crown, and, except by special grant from the Crown, cannot be vested in any one else. There is no special grant here.

And now let us examine the reverse aspect—the positive rights, if any, of the citizen. Over a hundred years ago, in the case of *Blundell* v. *Catterall*, the question arose, 'Is there or is there not a Common Law right to cross the foreshore for the purpose of bathing in the sea?' The King's Bench, by a majority (Mr. Justice Best admirably dissenting), held that there was not, though it was conceded generously that 'bathing in the waters of the sea is, generally speaking, a lawful purpose'. 'It will not be disputed,' said Mr. Justice Best, 'that the sea is common to all. Bathing in the sea, if done with decency, is not only lawful, but proper, and often necessary for many of the inhabitants of this country. There must be the right to cross the shore in order to bathe as for any lawful purpose. The universal practice of England shows the right of way over the sea-shore to be a Common Law right. All sort of persons who resort to the sea, either for business or pleasure, have always been accustomed to pass over the unoccupied parts of the shore with such carriages as were suitable to their respective purposes, and no lord of a manor has ever attempted to interrupt such persons. . . . Men have from the earliest times bathed in the sea; and unless in places or

at seasons when they could not, consistently with decency, be permitted to be naked, no one ever attempted to prevent them.'

But the majority of the Court drew a somewhat fanciful distinction between crossing the foreshore for the purpose of fishing or putting to sea in a boat to fish and crossing the foreshore for the purpose of bathing, on the ground that fishing was an ancient practice necessary for the nation's food-supply. That argument may have had a plausible claim at that date. The total immersion of the body in seas or rivers was then a rare and audacious proceeding, only attempted after elaborate arrangements for the preservation of life and modesty. Our grandfathers entered the sea secretly under large umbrellas, secured with strong ropes, and almost fully clothed. It was but natural, perhaps, that the Court should be reluctant to find any Common Law right to do something which was so exceptional. But to-day all is changed. The numbers of our fishermen have not increased—rather the reverse; but we have become a nation of swimmers. Nearly all our citizens can swim; and even those who cannot swim enter the water without fear eagerly and often. How great is the change is evidenced by an *obiter dictum* of the learned judge already quoted: 'I believe the use of machines is essential to the practice of bathing. Decency must prevent all females and infirmity many men from bathing

except from a machine.' Nor is this exercise to be dismissed as a mere enjoyment or contribution to health. He who can swim may in an emergency preserve not his own life only but those of others. ' By bathing,' says the same authority, ' those who live near the sea are taught their first duty, namely, to assist mariners in distress. They acquire, by bathing, confidence amidst the waves, and learn how to seize the proper moment for giving their assistance.' And since fish, like other food, is only one means of preserving human life, it may be said truly that swimming is as important, from the national point of view, as fishing.

But it is not necessary to measure mathematically the merits of these two practices. The point is not that the subject is entitled to such-and-such a use of the sea ; he is entitled to *every* use of it. ' Is it to be supposed,' said Mr. Justice Best, ' that in a country the prosperity and independence of which depends on navigation, that which is so necessary to navigation as a road for all lawful purposes to the sea should not have been secured to the public, particularly when it might be done without injury to the interests of any individual ? ' ' What is the ocean ? ' said Lord Mildew in *Pratt* v. *The Ancient Society of Fishmongers* (1872, 2Q.B.). ' It is not too much to say that the ocean is a part of the British Constitution. For generations, for centuries, the island race have lived beside, upon, by, with, and from the sea. The sea is in their

veins; and hence, as we proudly say of some of them, their very blood is blue. An England without free access to the sea is as inconceivable as a Switzerland without mountains. The bird to the air, the Arab to the desert, the Frenchman to the café, the Briton to the ocean——' But I have quoted enough. To every word of that celebrated judgment I lend my support. These are without doubt the natural and juridical relations of every inhabitant of these islands to the element which surrounds them. And once that is apprehended our task in this case becomes much easier. It becomes fantastic, for example, to think of a small body of shopkeepers forbidding a British subject to enter the sea; and the apex of absurdity is revealed when we hear that the same shopkeepers *have exacted a fee* from the subject for *their* permission to enter the sea. They have as much right or reason to charge a fee for walking along the King's highway. Indeed, many of us were brought up to regard the ocean as the King's highway;[1] and, though that concept may have had its day in relation to other countries, as between Mr. Haddock and an over-zealous body of councillors it has a very real existence.

I find therefore that the majority of the Court of King's Bench was wrong; that there is and always has been a right at Common Law to use the

[1] 'The shore of the sea was holden by the King, like the sea and his highways, for all his subjects.'—Best, J.

foreshore for any lawful purpose, as there is to use the highway or a piece of common land. Over the area above high-water mark the Council have the powers unwisely entrusted to them by Parliament, but in the area below high-water mark they are not entitled to make regulations or to order prosecutions unless the law of the land is broken or a legal nuisance is complained of, as, for instance, the excessive noise and water-displacement of fast motor-boats, or some recognized legal injury is done to a citizen or citizens. It is lawful to swim in the sea ; it is lawful to swim on Sunday (whatever the Council may say) ; it is lawful to dress or undress on the foreshore with due regard to decency ; it is lawful to wear a costume generally considered decent and sufficient by the reasonable majority.[1] The Councillors were not elected as arbiters of morals or decency ; they were elected to manage the finances and the drains, which they do not do very well. Nor by their election were they given possession of the shore or the sea ; and the exaction of any payment from a bather, in the absence of some consideration or service, such as the use of a bathing-hut, is *ultra vires* and illegal. Mr. Haddock, who in the present case, refusing to employ the insanitary bathing-huts provided by the Council, merely deposited his macintosh on the foreshore, was right not to pay.

[1] But see *Rogers* v. *The Corporation of Eastbourne* (1929, 2 K.B.), in which a large whiting, the property of the plaintiff, was arrested for indecency.

The conclusion is that below high-water mark the citizen who behaves himself before the Common Law may snap his fingers at the Council. The appeal must be allowed. I am glad indeed to have had the opportunity to rescue from oblivion and commend to his fellow-countrymen our defunct but learned and sagacious brother, Mr. Justice Best.

Lord Arrowroot said: I agree. I am aware that it is the purpose of the Council by these regulations to encourage foreign travel among their countrymen. This decision will hamper them in that purpose, but it cannot be helped.

Lord Sheep said: I agree. If it were not so we should have the absurd conclusion that a local authority might order all bathers to enter the sea in woollen stockings, at the end of long chains.

Lord Lick and *Lord Laburnum* concurred.

NOTE.—See Wedderburn on *Wharfage*: 'Probably the Lord Chancellor could have expressed himself more forcibly still. An examination of the Town Police Clauses Act, 1847, and the Public Health Acts Amendment Act shows that local authorities have power to make regulations to prevent "the indecent exposure of the person" but not to act as dress-designers or censors of beach-wear. Indecent exposure is a simple question of fact.' See Mr. Justice Wool in *Sieveking* v. *Wattle*: 'Stuff and nonsense, constable! The male torso is not indecent. If it is hairy it may be unattractive: but so is the male foot. So is your face; but the Council cannot compel you to drape it. A lady's back is not indecent: it may be attractive, but so are a lady's eyes. The Act says "indecency", not "allure". My father wore nothing but drawers. So did I. What fudge!' See also *Fashions and Ramps*, by 'A Hosier', for the secret history of the 'University' costume.

(XX) BACON *v.* EGG; KIDNEY *v.* EGG

The Law of Criticism

THE hearing of this case was concluded in the High Court to-day before Mr. Justice Trout.

His Lordship, in his summing-up to the jury, said: This action is one of the most entertaining in my recollection.

The defendant, Mr. Egg, is, as you have heard, renowned for the vigour of his views and the frank manner in which he expresses them as the dramatic critic of *The Moon*. Such is this renown that the managers of several theatres have ostentatiously withheld from him the customary invitation to the first performance of their plays. Among these managers is Mr. Horace Kidney, who recently presented a play by Mr. Bacon entitled *Between Ourselves*. Mr. Egg was not invited, as the other authorized critics were invited, to view without payment the first performance of *Between Ourselves*; but, being anxious to see Mr. Bacon's new work as early as possible, he purchased, or hired the use of, a seat in the pit in the usual way. The circumstance that on this occasion for the first time he wore blue spectacles and a bright red wig

in order to escape the notice of Mr. Kidney is for our purposes irrelevant and may be dismissed from your minds.

Mr. Egg then wrote, and published in *The Moon*, a very unfavourable account of the play and of the manner in which it was performed. ' Dialogue, deplorable ; plot, puerile ; characterization, childish '—this is one of the comments particularly complained of ; and he concluded by remarking that ' *The fact is, Mr. Bacon does not begin to know his business ; and after this production we begin to doubt whether Mr. Kidney knows his.*'

You have been told in evidence that these expressions of opinion, strong and even hostile though they may appear, are not more severe than what is commonly said about those who attempt to give pleasure and amusement to their fellow-men. But both Mr. Bacon and Mr. Kidney resented them and have brought actions for defamation against Mr. Egg.

They have based their complaints, not only on the strength and the character of the words employed by Mr. Egg (which, they admit, are not exceptional), but on the strange ground that Mr. Egg was not invited to express an opinion at all. There is here a misconception of the law which I must at once expose to you. We have been informed in this case that it is the common belief among theatrical managers that only those are entitled to criticize their productions who are

invited to do so. That belief, if it exists, has no foundation in law. It has been clearly laid down that every man who publishes a book or presents a play submits himself to the judgment of the public; and any one may comment upon his work within the limits of what may be fairly called criticism. Lord Justice Bowen, in the celebrated case of *Merivale* v. *Carson*, with which you are no doubt familiar, spoke of the '*common right of public criticism which every subject of the realm equally enjoys—the right of publishing a written criticism upon a literary work which is offered to public criticism*'. And I am not permitted to find fault with what was said by Lord Justice Bowen in the year 1887. It is a favourite saying in the bars of this free country that any man is entitled to his own opinion; but, what is more, he is entitled to express it, provided it is not defamatory.

The right of criticism, then, is not confined to the professional critic; and it would be lawful for every member of an audience to write to the papers about a play which they disliked. It is fortunate, perhaps, that they do not exercise this right; on the other hand, if it did not exist, it would follow that no man would be able to write in a letter to his aunt (as we frequently do), 'I have just read *Dandelion*—it is bilge,' without exposing himself to an action for defamation.

Much less can the right be conceded to one class of professional critic and withheld from another.

The critic who is invited and the critic who is not, the critic in evening-dress and the critic who chooses to disguise himself with blue spectacles and a red wig—all these are equally entitled to express their opinion of a drama publicly performed, not as critics but as citizens. 'Any one can criticize,' said Lord Mildew in *Twopenny* v. *The Bank of England*, and, whether or not that is true in fact, it is true in law. For the right of criticism is a public right and not a favour to be bestowed upon individuals at the pleasure of managers and authors. We have been informed that the managers of certain theatres make arrangements for the exclusion and ejection of Mr. Egg by force, if he insists upon attending their performance uninvited. In such a case I conceive that Mr. Egg might successfully bring an action for trespass, or even breach of contract, against the manager responsible for his ejection. For he who invites the public to a public entertainment may only exclude an individual on the ground that he is offensive to the public by his being noisy, quarrelsome, drunk, or diseased; and, much as he, or we, may detest the personality of Mr. Egg, there is no particular reason to suppose that he, or any dramatic critic as such, is more likely to give that kind of offence than any other person. However, in the present case, owing to the ingenious device of the red wig, no such situation arose; and I only throw out the suggestion for

the titillation of law students and legal debating societies.

Again, where legal malice is alleged, such as will remove the expressions of a critic from the region of fair comment into the domain of defamation, it might be held to be evidence of malice that a critic who knew himself to be unwelcome had insisted upon thrusting himself in and had thereafter adversely criticized the entertainment. But here no charge of special malice is made, for the plaintiffs have admitted that Mr. Egg is accustomed to express himself with the same violence whether he is invited or not. In short, ladies and gentlemen, what with one thing and another, in so far as the plaintiffs rely upon the fact that the defendant was not invited, it is my direction to you that they have no case.

This is not to say that they may not succeed upon other grounds. Now, the law of libel is almost incomprehensible, except to those who have studied it from their cradles, and even for them it is a labyrinth of uncertainties, of false clues, blind alleys, and unexplored passages. Counsel for the defence has elaborately explained it to you, and probably some part of what he told you was correct. He has claimed that Mr. Egg, in the expressions complained of, has done no more than to exercise the right of every citizen to utter a fair and honest opinion on a matter of public interest, that is, a literary work exhibited in public

for the judgment of the public. Mr. Swoot, however, who appeared for the plaintiffs, has reminded us that an honest opinion, fairly expressed, upon a matter of public interest, may still be defamatory. For example, it is defamatory to use expressions reflecting upon a man in the way of his trade, profession, or calling. The law of this business-like land is jealous to protect our professional reputations; and spoken words reflecting upon them (by a special exception to the general law of slander) are actionable *per se*, without proof of special damage. To say of a doctor that he had no knowledge of medicine, of a solicitor that he knew nothing of the law, or of a banker that he did not know his business would without doubt be defamatory, however honestly the opinion was held and however moderately that opinion was expressed. Nothing but the strongest proof that the assertions were true in substance and in fact would be sufficient excuse for them in an action for defamation; yet it is undeniably a matter of public interest that our doctors, our solicitors, and our bankers should know their business.

'Now what,' says Mr. Swoot, 'is the distinction in law between the doctor and the dramatist?' I hold that there is none. There cannot be one law of libel for the author and another for the financier. An imputation of professional incapacity or unfitness is as damaging to the one as it is to the other; and each must be entitled to

the same remedy at law, unless we are prepared to say that the author is a kind of outlaw, having a lower status than the solicitor or business man and entitled to a lower standard of justice. Unfortunately this view is very commonly held, and it has been encouraged by the feeble acquiescence or noble disdain of the writing profession; but in this court it will receive no encouragement. I hold that the author, however loathsome to the ordinary citizen, is in the eyes of the law a professional man; and the newspapers must be as careful what they say about his professional fitness as they would be in the case of a surgeon. That is to say, any comments they may make upon his work must be both honest and fair; and if they go beyond that to the statement of facts, which, if they were true, would disqualify the author from practising his profession, then they must be prepared to prove that those statements are true. In this case Mr. Egg has made no attempt to prove that Mr. Bacon and Mr. Kidney are not fitted to practise the business of entertaining the public by the writing and presentation of stage-plays. All he has shown is that this particular effort has failed to please him. That opinion he has expressed intemperately, relying upon a supposed right to say what he likes. The evidence is that by what he has said he has deterred many thousands of citizens from visiting the Joy Theatre, and at least two managers from purchasing Mr.

Bacon's new play *Daffodils*. He has damaged the plaintiffs in their business and he must pay for it.

The jury found for the plaintiffs. Damages £10,000.

NOTE.—'It is hoped that before the present century is ended some occupant of the Woolsack may possess sufficient virility and legal knowledge to prepare a measure for the amendment and consolidation of the law of defamation. Among other reforms: (1) the grotesque distinctions between libel and slander should be swept away (in this Radio Age it is a little late to maintain that writing is more dangerous than speech). (2) the liability of the printer for defamatory matter printed to order in the course of his business should be abolished, since the apprehensions of printers operate frequently as an unofficial censorship; (3) an authoritative definition of "fair" comment is needed (see *Blowhard* v. *Simpkins* (1928), in which the single word "Tripe!" was *held* to be a "fair" criticism of a sculptor's life-work, because honestly believed in); (4) the rights of authors and the limitations of criticism should be clearly laid down—e.g. in *Bacon* v. *Egg* there was no appeal and the House of Lords have never considered Mr. Justice Trout's novel argument that the same care should be used in discussing publicly the competence of an author as would be required from one who criticized the professional fitness of a surgeon or business man. Under the law as at present administered no man dares to breathe a public word against a grocer; but anyone may say what he likes about a painter; yet both depend for their livelihood on selling their goods. Nor is it clear why one who writes a book is held to "submit himself to public criticism", while one who exhibits a motor-car at the Motor Show is not.'—Albert Haddock (*Vinerian Lectures* 1930).

(XXI) HADDOCK AND OTHERS *v.* MR. JUSTICE FOOT

What is a Jury?

THIS case, which may well come to be the classical authority upon the law of contempt of court, was advanced another stage to-day.

It will be recalled that some months ago the behaviour of a jury in the Probate and Divorce Division aroused the displeasure of Mr. Justice Foot, who was temporarily hearing divorce suits during the indisposition of the President. His Lordship, who is not in robust health himself, had made some strong comments on the conduct of the respondent and co-respondent in the case, who had been seen by detectives in a taxi-cab at Piccadilly Circus; and he told the jury that he expected them to draw the worst conclusions and to find for the petitioner. The jury, after a long retirement, found for the respondent; and the foreman, a Mr. Haddock, added: 'The jury are of the opinion, milord, that your remarks about the taxi-cab were in the worst of taste.'

The Judge sternly ordered the jury to retire again and reconsider their verdict. On their return the foreman read out a long statement,

composed in rhymed couplets, reiterating the previous verdict, criticizing the intellect and disposition of the Judge, and concluding thus:

> Proceedings in the taxi-cab,
> We find, were decorous and drab.
> Your Lordship is extremely deaf,
> And burbles in the treble clef.
> You know the law, we must suppose,
> But that is all your Lordship knows.

The remainder of the jury then made emphatic signs of assent, and his Lordship, remarking, 'This is no place for verse,' ordered the whole jury to be committed to prison for contempt of court.

Mr. Haddock, to the general surprise, then said: My lord, we elect to be tried by a jury.

The Judge: You *what*?

Mr. Haddock: Is your Lordship familiar with the case of *R.* v. *Spettigue*?

The Judge: No, I am not.

Mr. Haddock: My lord, it was an unreported case, but in that case, milord——

The Judge: I will not bandy cases with you. Usher——!

Mr. Haddock: Milord, with great respect, milord, it is an elementary principle of our system of justice that no man shall be tried except by his peers. It is also accepted that no man shall be judge in his own cause—*Nemo debet esse judex in propria causa.* Now, milord, the party charged at

the moment is a jury, and a jury can have no peer but another jury. Historically, milord, at least, a jury ranks as high as a judge, or even higher; indeed, milord, the jury or court of citizens assembled *was* the first judge. It follows from this, milord, *pace* Professor Milk——

The Judge (*sternly*): Usher, have these persons removed and committed to custody.

Mr. Haddock: Milord, it is only fair to warn you that we shall formally resist arrest and subsequently institute proceedings for false imprisonment and bagotry.[1]

The Judge: You will go to prison till you have purged your contempt.

Mr. Haddock: We will *not* purge.

The jury were then removed to Brixton Prison, where they have remained for the last six weeks, resolutely refusing, as their foreman had predicted, to purge their contempt by apology or *murrain obeisant*. The affair is said to have weighed upon his Lordship's mind, and yesterday he ordered the recalcitrant twelve to be brought before him.

The Clerk of the Court put the historic question: *Do you purge, or doth this contempt stand fast infeasible?*

Mr. Haddock: We do not purge, unless this matter be tried according to law.

Sir Ethelred Rutt, K.C.: Milord, I have been instructed to appear for the persons charged. I

[1] But what is this?—ED.

do so with some reluctance, milord, having regard to the unusual nature of these proceedings——

The Judge: I cannot hear you, Sir Ethelred.

Sir Ethelred: Then I will speak up, milord.

The Judge: You have no right to appear. There is an inherent power in the Court to protect the dignity of the Court and the processes of justice by the committal of offenders for contempt.

Sir Ethelred: Milord, it is the jury's case that under the Constitution there can be no right or power, except as provided by statute, to imprison without trial. Least of all could there be such a right where the person ordering the imprisonment is the person complaining of an injury; no man, milord, can be both plaintiff and judge.

The Judge: I am not a plaintiff. I am protecting the dignity of the Court.

Sir Ethelred: With great respect, milord, I am instructed to say that you are protecting in this case your personal dignity. The jury have not obstructed the process of law, but they have in their official capacity made comments on your personal conduct. Now, milord, like yourself, the jury is a part of the machinery of the Court (whether an equal or a superior part does not at the moment matter). If what is said or done to your Lordship in this Court must be understood always to reflect upon the dignity of the Court, as opposed to your own personal dignity, milord, then the same reasoning must apply to the jury,

in which case your Lordship's action in assaulting and detaining the jury without trial might be held to constitute a contempt of Court, for the jury is an instrument of the Court—an instrument so important, milord, that you are accustomed to leave to the jury all those questions which you yourself find too difficult to answer.

The Judge (*who seemed a little bewildered*) *:* I beg your pardon ?

Sir Ethelred : In the alternative, milord, if the jury are to be considered not as an instrument of the Court, acting as such, but as a collection of individual subjects, then in respect of anything they may say or do they are entitled to the ordinary rights of the subject, that is to say, to be heard in evidence, to call evidence, to be represented by counsel, and to be tried before a jury.

The Judge (*feebly*) *:* I do not think I feel very well, Sir Ethelred. Nevertheless, let a jury be empanelled.

A jury was then empanelled and sworn.

Sir Ethelred : Call Silas Foot.

The Judge : Who is he ?

Sir Ethelred : Sir Silas Foot, milord—Mr. Justice Foot.

The Judge : This is very irregular.

Sir Ethelred : Not more irregular, milord, than your treatment of my unfortunate clients.

The Judge : But I cannot give evidence in my own Court.

Sir Ethelred: In the special circumstances, milord. Milord, you are, as it were, the plaintiff in this suit, arising out of the expressions used by my clients, and in the counter-charges, milord, arising out of your alleged trespass to Mr. Haddock and his colleagues, you are, as it were, the defendant. In both cases, milord, you would wish, no doubt, to be heard; and if not, milord, my instructions are, milord, to subpoena you.

The Judge: Can I not make a statement?

Sir Ethelred: My clients, milord, are prepared to go into that box and give sworn testimony; and I shall be compelled to point out to the jury, milord, that a statement not made upon oath is comparatively valueless as evidence in a court of law.

The Judge: That seems reasonable enough. But a small point occurs to me, Sir Ethelred. While I am in the box who is to occupy the Bench?

Sir Ethelred: Milord, I take it that you will be represented by learned counsel in this case?

Sir Timothy Mole, K.C.: I shall be happy to appear for his Lordship.

Sir Ethelred: Then perhaps me learned friend would represent your Lordship on the Bench while your Lordship is giving evidence?

The Judge: Is there any precedent for all this, Sir Ethelred?

Sir Ethelred: No, milord; but as Lord Mildew said in *Doggett* v. *The Port of London Authority*,

'There is no precedent for anything until it is done for the first time.'

The Judge: Very true. Do I take off my robes?

Sir Ethelred: If your Lordship pleases.

The Judge then removed his robes, revealing an anaemic old gentleman in his shirt-sleeves. Sir Timothy took his seat on the bench, his Lordship was sworn, and stated on oath his opinion of Mr. Haddock.

Sir Ethelred (*cross-examining*): Are you ninety-four?

Witness hesitated before replying.

Sir Ethelred (*sternly*): Answer the question, please.

Sir Timothy: I cannot allow the question. How can the witness remember how old he is at his age?

Sir Ethelred: You complain of certain disrespectful expressions employed by my clients?

The Judge: I do.

Sir Ethelred: Can you name any other circumstances in which a person complaining of disrespectful language would be by law entitled to imprison without trial the user of that language?

The Judge: No. But I do not pretend to know anything about the law. I expect counsel to look up the cases and tell me.

Sir Ethelred: That concludes my clients' case.

Sir Timothy: After what you have just said,

milord, speaking as your legal adviser in these proceedings, I advise you not to return to the Bench.

The Judge then burst into tears, and took his seat at the solicitors' table.

Sir Timothy (*representing the Judge*), summed up the case to the jury. Speaking as his Lordship's legal adviser, he threw himself upon their mercy; speaking as the Judge's deputy on that Bench he said there was nothing to be said for his Lordship.

The Foreman of the Jury: We are a little confused, but we find his Lordship guilty of contempt of Court.

The Judge then returned to the Bench and dismissed himself with a caution as a first offender. Mr. Haddock and his associates were then released. It is thought that more may be heard of this case. It is rumoured that his Lordship is contemplating retirement for reasons of health.

NOTE.—It is 'contempt' to make faces at a cross-examining K.C. (*In re Fitzmaurice*), but not (*Martin's Case*) at a solicitor's clerk. A member of the jury may powder her nose in the box, but not use lipstick or (*Rex* v. *Salmon*) eat oranges. And see *Marrable* v. *Rowntree*, where the jury, on being discharged, sang 'For he's a jolly good fellow' and were committed for contempt.

(XXII) HADDOCK AND OTHERS *v.* BOARD OF INLAND REVENUE

Wear and Tear

THIS was an appeal from a decision of the Income-Tax Commissioners upon a case stated for the opinion of the High Court.

Mr. Justice Radish said: The appellant in this case is a Mr. Albert Haddock, a pertinacious litigant whom we are always glad to see. And let me say that it gives me pleasure to see the Commissioners, so often and for such poor cause the initiators of legislation, for once upon their defence.

Mr. Haddock asks for a declaration that he is, and has been for some years, entitled to certain allowances or deductions for income-tax purposes under the heading of (*a*) Expenses and (*b*) Wear and Tear of Machinery and Plant; and on the assumption that he is right he claims that a considerable sum is owing to him in respect of past years in which the Commissioners have refused to grant him such allowances.

Mr. Haddock appears on behalf of the whole body of authors, artists, and composers, and the position of a large number of creative brain-workers will be affected by our decision.

Now the theory of Income-Tax (under Schedule D) is that it is a tax upon the *profits* of occupations, professions, or businesses. The manufacturer of soap, who makes and sells soap to the value of ten thousand pounds, at a cost to himself of eight thousand pounds, is taxed upon two thousand pounds. And if there is no profit there is (in theory) no tax. He is not taxed on what comes into the till, but upon what goes into the savings-bank. Further, it is recognized by the State that his soap-manufacturing machinery and plant must in the nature of things suffer wear and tear with the passage of time, and on account of that depreciation he is allowed to deduct certain sums from his income, apart from the day-to-day expenses of his business.

Now the position of the author, artist, or composer is very different. But it is Mr. Haddock's first complaint that the Commissioners treat him as if he were in the same position as the soap manufacturer, except where it would benefit him to be treated so. In the vulgar phrase, he says, they have it both ways. The author is taxed, practically speaking, not on profits but on *receipts*, on almost everything that comes into the till. For the small deductions allowed to him on account of professional expenses are meagre and in no way comparable to the expenses side of the soap-manufacturer's profit-and-loss accounts.

An author, says Mr. Haddock, cannot write

about nothing (though one or two come very near to it). The whole of life is his raw material, and, like other raw material, it has to be paid for. His friendships, love-affairs, marriages, journeys, sports, reading, recreation, and social relations cannot be had for nothing. And Mr. Haddock argues very plausibly that his expenditure on these items, without which he would be unable to carry on his profession at all, should be entered on the 'loss' side of his profit and loss account. The Commissioners, however, have obstinately refused to allow him anything by way of expenses, except for such obvious and trivial items as stationery, typewriting, use of secretary, pens, pencils, india-rubber and so forth; they have allowed him nothing for hospitality, entertainment, or travel, and they have invariably deleted from his list of professional expenses such items as champagne, Monte Carlo, night-club subscriptions, 'first-nights', Deauville, and hire of yacht at Cowes. 'But how,' says Mr. Haddock, 'can a man write about Monte Carlo or Cowes unless he goes to Monte Carlo or Cowes? How is he to study and depict the gilded life of Society without constant visits to the Saveloy Grill Room, to Covent Garden, to the Riviera, and other places where Society is to be found?' These questions seem to me to be unanswerable; and they received no satisfactory answer from the representative of the defendants in the box. Further, it is not denied

that if a soap-manufacturer were compelled for business reasons to visit Cowes or Monte Carlo he would be permitted to deduct the necessary expenses of the expedition when calculating his taxable income. I see no reason why Mr. Haddock should not do the same.

Next, as to wear and tear. One of the constant disadvantages of the author's trade is that he is a one-man business, at once his own employer, designer, technician, machine-minder, and machine. Once the soap-manufacturer has equipped and organized his factory he may relax; a week's holiday, a month's illness will not suspend the output of his soap or the growth of his income. But when the author stops the machine stops and the output stops. He is unable, on holiday, in sickness, or in age to depute his functions to any other person. Here is one more reason why a hundred pounds earned by the author should not be treated and taxed on the same terms as a hundred pounds accruing as profit to the soap-manufacturer. 'Yet,' says Mr. Haddock, 'since this is done, let it be done thoroughly and logically. The author's machinery and plant are his brain and his physique, his fund of inventiveness, his creative powers. These are not inexhaustible; they are seldom rested (for the reasons given above); the strain upon them increases as the years go by, and in some cases, I understand, is aggravated by late hours and dissipation. And if

it is proper for the soap-manufacturer to be relieved in respect of the wear and tear of his machinery and the renewal thereof (which money can easily buy), how much more consideration is owing to the delicate and irreplaceable mechanism of the writer ! '

Under this head Mr. Haddock has repeatedly appealed for relief in respect of sums expended on doctor's accounts, on sunlight treatment, on nourishing foods and champagne, and upon necessary holidays at Monte Carlo and Cowes. The Commissioners have refused, and I find that they were wrong.

Under both heads, therefore, Mr. Haddock's appeal succeeds. He estimates that if his expenses be properly calculated on the basis already explained he has never yet made a taxable profit ; for at the end of every year of his literary operations he has been a little more in debt than the year before. In every year, therefore, he has been wrongly assessed and unlawfully taxed ; and I order the Commissioners to reopen the accounts for the past seven years and repay to Mr. Haddock the very large sums owing to him.

I may add a few words for the general guidance of Inland Revenue officials in this class of case. There seems to be an idea abroad (especially in Parliament, where every erroneous idea is carefully incubated) that the author deserves less generous treatment than the soap manufacturer, on the

ground that the latter is an employer of labour. Mr. Haddock in his evidence, some of which I read with reluctance, has ably exposed the fallacy herein contained, though his observations on the Derating Act were perhaps tinged with irrelevance. 'It is difficult,' he said, 'to discuss this notion with patience. What a poop Parliament is, milord! The authors, writers and composers are in a sense the biggest employers in the country, for they are the only original creators of employment. Their books, their articles, their music must be typed and printed and bound and distributed, performed upon the stage, the wireless, the gramophone, and the screen. The publishers, printers, compositors, bookbinders, and booksellers, the actors, musicians, singers, and stage-hands—nay, the very newspaper proprietors and their enormous staffs, owe their employment, their earnings, and their profits to the creative mind and technical skill of the writer, since without him their occupation would be nothing and their machines be silent. He is the producer and they an army of middlemen; he is the true creator of wealth, and they, if I may employ the genial language of a certain political party, are but parasites upon his brains and labour. Yet Parliament, in its recent Derating Act, designed to encourage and increase employment, extends the privileges of that Act to the printer and not to the author who finds employment for that printer,

'derates' the 'factory' section of a newspaper office, but not the editorial side, without which that factory would be idle and valueless. My Lord, how characteristically crass of Parliament! How utterly soggy! How——' But perhaps Mr. Haddock's point is now clear enough. The question whether the premises of authors ought to be classed as 'factories' under the Derating Act must be decided by some other tribunal than this. But the principles and values laid down by Mr. Haddock for the proper estimation of authors and writers are sound, and should govern the Commissioners and their officials in all their dealings with this deserving and valuable class of men.[1] The appeal is allowed.

[1] See *Rex* v. *Stoat* (1927) where a married couple, artists, found that they paid £31 10s. more by way of income-tax on their joint income than they had paid on their separate incomes before marriage. They therefore secured an unopposed divorce at a cost of £100, and, on the decree being made absolute, lived together as before, but in sin. Being unmarried, they were now assessed on their separate incomes, thus realizing 30 per cent *per annum* on the capital invested in the divorce. The Inspector of Taxes was charged with procuring an immoral act, but the Attorney-General entered a *noli tangere* for the Crown.

(XXIII) RUMPELHEIMER *v.* HADDOCK

Port to Port

THIS case, involving some difficult points of Marine and Traffic Law, was brought to a conclusion to-day.

The President of the Probate, Divorce, and Admiralty Division (who had the assistance of an assessor), giving judgment, said: This action was originally instituted in the King's Bench; but, Mr. Justice Juice holding that the issues disclosed pertained to the Law of Admiralty, although the ground of the claim was damage to a motor-car, the case was withdrawn from the King's Bench List and referred to this Court.

Mr. Rumpelheimer is suing Mr. Haddock for negligent behaviour on the high-road, as a result of which his motor-car, a costly Botellini-Ninebacho, was damaged. The dispute, as is usual at the present time, is only nominally between the parties named, the real litigants being two insurance companies. If it were not for the insurance companies there would be very little litigation of any kind to-day, and members of the legal profession owe to them a debt which we can only repay by careful labour and clear decisions.

On the 21st March last Mr. Rumpelheimer was driving his motor-car along the thoroughfare known as Chiswick Mall, which runs beside the north bank of the River Thames. Now, it appears that during the high spring tides, particularly those of the equinoctial season, the waters of the Thames overflow the banks and cover the highway to a depth of from two feet on the river side of the road to a few inches on the landward side. Such was the condition of affairs a little before high-water on the date in question, when Mr. Rumpelheimer, who had an important business appointment in the City, began his voyage along the Mall. His evidence is that he was keeping carefully to the left or landward side of the road, where it was still possible to drive through the shallow water without fear of damage. While thus engaged he was startled, he says, to see ahead of him, and coming towards him on the same side of the road, the defendant, Mr. Haddock, who was navigating with a paddle a small boat of shallow draught. The plaintiff blew his horn vigorously, but the defendant held on his course. Mr. Rumpelheimer shouted courteously, 'Out of the road, you fool!' and Mr. Haddock replied, as he admitted under cross-examination, 'Port to port, you foxy beetle! Are you not acquainted with the Rules and Customs for the Avoidance of Collisions at Sea? I am going to starboard.'

The plaintiff judged from this speech that he

had to do with a maniac, and, obeying an instinct of humanity, which in the circumstances deserves all praise, he swerved to the right rather than collide with the defendant's flimsy craft. But this manœuvre brought him into the deeper water, which penetrated to the delicate mechanism of his motor-car and caused it to stop.

It would not be profitable or seemly to dwell upon the exchange of views which followed. Although clearly expressed they reflect small credit on the breeding and education of either party. Mr. Rumpelheimer was compelled to remain where he was until the tide fell (Mr. Haddock, by the way, in gross breach of the customs of the sea, declined to convey him to the shore or pavement in his boat, on the ground that he feared a breach of the peace.) On the waters subsiding it was found that the car had been seriously damaged and it had to be towed to the nearest garage. Mr. Rumpelheimer was unable to keep his appointment and, as a result, he tells us, suffered pecuniary loss.

The evidence of Mr. Haddock was most unsatisfactory, and if he thought that by singing snatches of sea-chanties he would commend himself to the Admiralty Court he was mistaken. Further, he has imported into the case a deplorable element of personal prejudice. He made certain comments on the personal appearance of the plaintiff which he must have known can have no

juridical significance. He said that he had once or twice with resentment observed the defendant going about the neighbourhood in an opulent motor-car of foreign make, driving to the public danger, in excess of the statutory speed-limit and to his (Mr. Haddock's) inconvenience and alarm. He said that plaintiff seemed to think that he might be a law unto himself on the high-roads, but that he (Mr. Haddock) was blowed if he (Mr. Rumpelheimer) was going to get away with it on the high seas as well. He had therefore acted as he did, willing to discomfit Mr. Rumpelheimer, but believing that the law was on his side—that is to say, the regulations for the prevention of collisions at sea or in the tideway.

The defendant is clearly one who insufficiently appreciates the value of the motor-car to the human race. But we must not allow our natural detestation for such an individual to cloud our judgment. The meanest citizen, actuated by the meanest motives, is entitled to insist upon the enforcement of the law. The question is, 'What is the law?' a question which frequently arises in our Courts and sometimes receives a satisfactory answer.

Now, the law or custom of the road is that when two vehicles meet they shall each keep to the left. But the law or custom of the sea is that when two vessels meet they shall go to starboard and pass port to port, that is to say, they shall each keep

to the right. It is the contention of Mr. Haddock that when the tide covers the road that road becomes a part of the tideway, that traffic upon it is thenceforth governed by the regulations and customs of the sea, and that he did right, therefore, to steer so as to pass Mr. Rumpelheimer on his port hand. Further, it is the duty of a steam-vessel to keep out of the way of a rowing-boat; and Mr. Haddock argues that the plaintiff's motor-car when navigating the tideway has the status of a steam-vessel, and that plaintiff has nobody but himself to blame.

With considerable reluctance we find that there is some substance in these contentions. The law of the land says one thing; the law of the water says the contrary; and it seems elementary that (upon navigable waters) the law of the water must prevail. It is idle to say that Chiswick Mall was not at the time of the accident navigable water. Mr. Haddock was, in fact, navigating it, and if Mr. Rumpelheimer chooses to navigate it at the same time he must be bound by the appropriate regulations and should make himself familiar with them. Mr. Rumpelheimer makes the rather childish objection that his motor-car is not a vessel and ought not to be treated as such. I find no difficulty there. Recent developments of the internal-combustion engine, and in particular the outboard motor, have produced a type of water conveyance which in aspect and dignity is little

more than a floating automobile; and though Mr. Rumpelheimer's motor-car appears to be unseaworthy it is otherwise as much a boat as many motor-boats. The point is that, boat or not, it was navigating the tideway.

Again, it was argued for the plaintiff that, since the high-road was only covered with water by an exceptional inundation of short duration, it cannot be held to have lost the character of a high-road. But to accept this view would be to admit a very dangerous and confusing precedent. Suppose that large sections of our southern counties were covered for a long period by exceptional floods, so that the inhabitants were compelled to cross them regularly in steam- or motor-vessels, can it be doubted that the regulations of the water, as to the avoidance of collisions, the carrying of lights, sound-signals in case of fog, and so forth, would be observed and enforced in that area? Yet in principle the two cases are the same; and differences of degree cannot be allowed to derogate from principle. The fact that a certain area of water was once dry land and is expected to be dry land again is unimportant. Much of what we now know as land was once covered by the ocean, and *vice versa*; but a motorist would not be allowed to appeal to the customs of the sea because he was crossing the Romney Marshes, on the ground that that land used to be sea. In the same way it is idle for the plaintiff to urge that Chiswick Mall

used to be dry land. The question in every case must be a question of fact—Was this area at the material dates water or dry land? And neither geographical size nor extent of time is a relevant consideration. We find in this case that the scene of the mishap was water, and tidal water. Now, tidal waters lead to the ocean and are navigated by the vessels of every maritime country. The Regulations upon which Mr. Haddock relies are not of British origin or sanction only; they govern the movements and secure the safety of the ships of the world. The nations rely upon each other to observe them faithfully and defend them jealously. It will be easily seen what international complications might ensue if it were to go forth that the Admiralty Court of Great Britain was prepared to play fast and loose with them for the benefit of a motorist, however small the issues at stake. The defendant is no gentleman, but that is neither here nor there. We find for the defendant, much as we dislike him. The case is dismissed.

NOTE.—See Bracton: '*Lex non risu deletur*' or 'Ridicule will not repeal', or (Lord Mildew in *The Dukeries Case*) 'A man may laugh at the law, but the law will laugh last.' See *Rex* v. *Flanagan* (1919, 2 A.C.), in which the wife of a plumber died intestate leaving issue three children and net personalty £31,482. A charge of murder was preferred against the plumber, who raised the defence that, man and wife being at Common Law one person, it could not be murder to kill his wife. The plea was allowed, and a verdict of 'Suicide while of unsound mind' was returned; but it was *held* (Mould, L.J., dissenting)

that, being insane, the man was ineligible for unemployment relief. See also *Earl of Erne* v. *Maltravers and Gareth* (1893, 2 H.L.), where the Yaffle hounds hunted an aged Peer for four miles over the property of the plaintiff, who had forbidden the Hunt to cross his boundaries. In an action for trespass it was *held* (Fruit, L.J., dissenting) that though the Master had been guilty of negligence in employing short-sighted fox-hounds their pursuit of Lord Gareth was an Act of God which he could not have foreseen or prevented. On appeal, however, the House of Lords decided that, though not responsible for damage done by the dogs, he must make good that which was due to the passage of himself and his horse, and the case was referred to assessors for apportionment *quantum pertinet*. Later, on a writ of *quo corpore* (*Rex* v. *Maltravers*), the Master was found guilty of constructive assault in venery, and went bankrupt. (And see Wedderburn on *Water-courses*.)

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